

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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SPERO HARITATOS,

Plaintiff,

vs.

6:05-CV-930

HASBRO, INC., ET AL.,

Defendants.
-----X

Transcript of Motion Hearing held on
March 4, 2008, at the James Hanley Federal
Building, 100 South Clinton Street, Syracuse,
New York, the HONORABLE GUSTAVE J. DiBIANCO,
United States Magistrate Judge, Presiding.

A P P E A R A N C E S

For Plaintiff: HISCOCK & BARCLAY, LLP
Attorneys at Law
One Park Place
Syracuse, New York 13202
BY: ROBERT E. PURCELL, ESQ.
RICHARD HUGHES, ESQ.
KATHRYN DALEY CORNISH, ESQ.

For Defendant: PATTERSON BELKNAP WEBB & TYLER, LLP
(Hasbro) Attorneys at Law
1133 Avenue of the Americas
New York, New York 10036-6710
BY: KIM J. LANDSMAN, ESQ.

For Defendant: BOND, SCHOENECK & KING, PLLC
(Toys "R" Us) Attorneys at Law
One Lincoln Center
Syracuse, New York 13202
BY: JOHN G. MCGOWAN, ESQ.

JODI L. HIBBARD, RPR, CRR, CSR
(315) 234-8547

I N D E X O F T E S T I M O N Y

<u>Witness</u>	<u>D</u>	<u>C</u>	<u>RD</u>	<u>RC</u>	<u>FRD</u>	<u>FRC</u>
Robert E. Purcell	65	124	138	--	--	--
Spero Haritatos	141	--	--	--	--	--
Amanda Kramer	152	154	--	--	--	--
Kim J. Landsman	163	--	--	--	--	--

1 (Open Court, 10:10 a.m.)

2 THE CLERK: Spero Haritatos versus Hasbro,
3 Inc., et al., 05-CV-930, may I have the appearances for the
4 record.

5 MR. PURCELL: Thank you, your Honor. Robert
6 E. Purcell appearing on behalf of the plaintiff Spero
7 Haritatos. With me today is Mr. Haritatos at counsel table
8 and his wife Sharon Haritatos in the gallery. Also with me
9 today are co-counsel Richard Hughes and Katie Cornish.

10 THE COURT: Good morning to plaintiffs.

11 MR. LANDSMAN: Morning, your Honor, Kim
12 Landsman of Patterson, Belknap, Webb & Tyler for defendant
13 Hasbro and with me also from Patterson, Belknap is Amanda
14 Kramer.

15 THE COURT: Okay, good morning to you.

16 MR. MCGOWAN: Good morning, your Honor, John
17 McGowan for Toys "R" Us.

18 THE COURT: Okay. Good morning to you,
19 Mr. McGowan, I did get your letter, I looked at it last
20 night, the February 29th letter, where you announce that
21 you're withdrawing the motion to disqualify the Hiscock firm
22 and I've granted that request and therefore your motion to
23 disqualify is withdrawn.

24 MR. MCGOWAN: It is, your Honor. Thank you.

25 THE COURT: So I don't know if we need you to

1 participate this morning, you're welcome to observe but --

2 MR. MCGOWAN: I may stay just for a moment or
3 two, your Honor.

4 THE COURT: Okay. I'll have the clerk
5 distribute copy of this, you'll get it of course
6 electronically, but I granted that request by Mr. McGowan.
7 So this morning we'll be concerned only with the motion for
8 sanctions brought by Hasbro. Okay. Mr. Landsman, you ready
9 to proceed?

10 MR. PURCELL: Yes, your Honor.

11 THE COURT: Okay, go ahead.

12 MR. LANDSMAN: I was telling Ms. Gridley this
13 has the most sensitive microphones I've ever dealt with.

14 THE COURT: I see that. We'll all be able to
15 hear each other.

16 MR. LANDSMAN: May I please the court, we
17 represent defendant Hasbro, Inc. and we're here to seek
18 sanctions against plaintiff and/or his attorney Mr. Purcell
19 for essentially obstructing and delaying discovery every step
20 of the way. They've failed to produce discovery pursuant to
21 two court orders and have interposed a mind-boggling number
22 of boilerplate objections to every request we've made.

23 We start here with your Honor's August 11th,
24 2006 order where you declare, we had moved to compel
25 production from the plaintiff on our first document request

1 and also moved to compel responses on the second set of
2 document requests and the first set of interrogatories that
3 he refused to respond to at all because he said we were out
4 of time. The court declared his position unreasonable and
5 solved the problem by extending discovery deadlines. And
6 then --

7 THE COURT: This is the August 11th order?

8 MR. LANDSMAN: Yes, your Honor. And then this
9 language, that it was a clear admonishment against just the
10 kind of behavior that has brought us here, your Honor stated
11 that, "This court will no longer be involved in minor
12 disputes in which it appears that the parties are simply
13 attempting to avoid or delay disclosure of information."

14 Now that order required the plaintiff to
15 produce the documents within 30 days, it is September 11th.
16 Now I'm sure Mr. Purcell will point out that he filed
17 objections to that order but he did not move to stay the
18 order, and it is crystal clear both in the Rule 72 and in the
19 case law interpreting it that the order is not stayed unless
20 explicitly done so. It is an order of the court, it's 72
21 distinguishing 72(a) of orders on nondispositive motions and
22 72(b), recommendations. Your Honor's order was not a
23 recommendation.

24 And then the case law also makes that clear
25 including cases we've cited here on the slide from the

1 Southern and Eastern District which state in clear language
2 that the mere filing of objections does not automatically
3 stay a magistrate judge's order.

4 So he had to produce documents by
5 September 11th and respond to our discovery requests by
6 September 11th. He of course did not. And also at any rate
7 Judge Hurd denied his objections in the October 19th order
8 and Judge Hurd ordered that all discovery be produced, all
9 outstanding discovery, that is everything outstanding, not
10 just what we've moved on, be produced by November 30th, 2006.
11 He didn't comply with that order either. As of
12 November 30th, 2006, we'd gotten nothing from him. We didn't
13 get anything in fact until mid-January 2007.

14 Now I want to emphasize here that we're not
15 talking, when we talk about the discovery that has been
16 blocked, about a few minor details or one or two missing
17 items. We're talking about wholesale blocking of discovery
18 requests and this slide we set out for your Honor as to each
19 of our discovery requests what is missing or deficient, and
20 even before we get to the January discovery requests, there
21 are 37 separate requests we did not get sufficient answers
22 to, including about eight document requests, numerous
23 interrogatories, and on the requests to admit which we'll go
24 into in a minute, basically when we were asking about
25 websites, the plaintiff saying he couldn't find out any

1 information which was nonsense.

2 And the blocking of discovery was not for lack
3 of trying, on Hasbro's part. Your Honor may recall that in
4 the letters that were exchanged on this back -- it was last
5 fall, Mr. Purcell made the point that we had not attempted to
6 meet and confer on the deficient or missing responses, in
7 fact as shown in this slide there were numerous letters sent
8 to plaintiff, none of which did us any good, and then some of
9 the letters he simply quibbled and argued with us. Others
10 were ignored and then orders were ignored. So he refused to
11 budge notwithstanding multiple letters attempting to confer
12 and obtain the outstanding discovery. The only production
13 that plaintiff made following the court's two orders was not
14 made until January 2007, three months after Judge Hurd had
15 denied the objections through your Honor's order and five
16 months after your Honor's order.

17 What we first found out, we first got an
18 e-mail in December 7th and Mr. Purcell actually was kind
19 enough to attach to his exhibits various strings of e-mails
20 concerning this document production that was eventually made
21 in January, and in a voice mail to me he said that he had two
22 boxes of Fed Ex courier stuff that the Haritatoses had gotten
23 together since I think two or more months ago before he left
24 his old firm, Wall, Marjama, and vaguely said, well, it may
25 be some of the stuff that the magistrate judge's order

1 required them to produce, haven't Bates stamped it yet. In
2 other words, he's still not ready to produce anything in
3 December 14th, 2006.

4 Now although he has not told us exactly when
5 he got those documents, he has said in the declaration that
6 he submitted to this court that he had them before he left
7 Wall, Marjama on October 16th; in other words he had -- he
8 should have gotten them before, well before September 11th
9 and produced them in response to your Honor's order. He at
10 least had them when he left Wall, Marjama and he didn't
11 produce them. Then whenever he got them from Wall, Marjama,
12 it's not quite clear in his papers but it seems to have been
13 at least the first week of December, it then takes him until
14 the second week in January to actually send them to us,
15 notwithstanding the fact that we made it clear right from the
16 beginning that if he so insisted, we would pay for it,
17 although that was not the way we had proceeded in the past.

18 On December 7th he told me he had two boxes of
19 documents in an e-mail but was not ready to produce them. On
20 December 27th he e-mailed me again that the documents were
21 not ready, that's in his Exhibit 25, he asked how I wanted to
22 proceed, I said, let's proceed the way we always have, you
23 copy them and send them to me, it's not worth my time to come
24 up to Syracuse to see what I want and don't want, just send
25 them. And I ended that e-mail by saying, bill us for that if

1 you wish. And yet it wasn't again until the second week in
2 January that we finally got those documents.

3 Now I want to go through just a couple of
4 examples and we'll go through this more in the testimony of
5 the obstructionist type of responses that we got to our
6 request, and I put up on this slide just an example of our
7 first request, a very simple one for two samples of the
8 products at issue where he says he's used the Candyland mark.

9 And you see in the first paragraph of the
10 response, it's basically every boilerplate objection known to
11 any lawyer who's ever practiced including that request for
12 two samples of product is vague, ambiguous, and
13 unintelligible. This litany, this paragraph litany of every
14 conceivable boilerplate objection was made in response to
15 every single document request we ever made, all 40 something
16 of them, which shows that there was absolutely no thought put
17 into it.

18 And as is obvious from looking at a request
19 for two samples, there can't be any thought put into an
20 objection that a request for two samples of products is vague
21 or unintelligible. When you finally get to the end of that
22 response in -- I'm sorry, the second paragraph right in the
23 middle, he then objects, and this is in the spring, objects
24 to producing samples because the products are apt to melt.
25 This is at a time when his client claims that he's shipping

1 products by mail and yet his lawyer is telling me, oh, I
2 can't send you samples of products, they might melt. Well,
3 you know, we're not that concerned about the melting product,
4 we wanted to see what they came in and he wouldn't even send
5 us that.

6 Now if you look at what he did with our sets
7 of interrogatories which is, this is on the slide here and
8 we're using the example of a simple interrogatory seeking the
9 names of products using the Candyland mark and the date that
10 he first used the Candyland mark on any such product, the
11 sheer length of the response is telling enough. Again, the
12 first paragraph is just every conceivable boilerplate
13 objection, and again, this -- these kind, that first
14 paragraph appeared at, I think in all of his interrogatory
15 responses, at least in virtually all of them.

16 And then at the end he does something that is
17 also entirely improper, he refers us to deposition
18 transcripts. Now Rule 33(d) allows a party in answer to an
19 interrogatory request to refer to business records. Nothing
20 allows him to refer simply to other documents or an entire
21 deposition transcript, and even if you're referring to a
22 business record, the rule says that you've got to at least
23 tell the other party where to find them, to specify the
24 records. He was here just referring to entire deposition
25 transcripts without giving us lines or pages to look at. And

1 what this is designed to do is just sort of say, just kind of
2 reference everything just like boilerplate objections are
3 intended to say, well, if sometime later on you say that I
4 didn't produce what I was supposed to do, I can say that I
5 interjected an objection, and the objections basically don't
6 allow us to know what he is or isn't producing and whether he
7 is in fact producing everything that is in response,
8 notwithstanding the objections.

9 THE COURT: What's the date of this
10 interrogatory, do you recall?

11 MR. LANDSMAN: I could find it in just a
12 minute, your Honor.

13 THE COURT: Is this one of the early sets?

14 MR. LANDSMAN: This was a set that was part of
15 the August 11th order, we had served it before the order, he
16 had refused to respond to it because he said that we had
17 taken the position that fact discovery had been over by
18 agreement of the parties, even though the actual pretrial
19 order didn't distinguish between fact and expert discovery,
20 and then your Honor's -- we in our letter motion to the court
21 asked to order him to respond and that's what you did in the
22 August 11th order.

23 THE COURT: So this is a response that you got
24 to -- after the August 11th order, in January?

25 MR. LANDSMAN: Yes, your Honor, it's a

1 response to a May 31st, 2006 interrogatory and I think he
2 responded sometime around September 18th.

3 THE COURT: Okay, thank you.

4 MR. LANDSMAN: It's actually our Exhibit 11,
5 your Honor, which says that it was served October 16th, 2006.

6 Now let's go to example of the abuses that
7 occurred in the first request for admissions. And the ones
8 that we are focusing on here had to do with websites from
9 various stores around the country that were selling candy
10 under the name Candyland. This was intended to show as we
11 did on our motion for summary judgment that the mark was at
12 best weak and probably generic, and in our request to admit
13 and request number 19, for example, we referred him to a very
14 specific URL, a very specific website and said, here's what
15 it says, and in our Exhibit 39, you can see a printout from
16 that website, and it's not very hard to find, you simply type
17 in the URL that we told him to type in, and yet he said that
18 after making reasonable inquiry, information known or readily
19 obtainable is insufficient to enable plaintiff to admit or
20 deny that request. And he did that as shown in our previous
21 slide to approximately, I believe it was 20 requests to admit
22 about what was in various websites.

23 Now one last example here is from the second
24 set of requests for production of documents which again came
25 in in October and was the subject of your Honor's August

1 order, we were simply asking for documents evidencing sales
2 in New York City and that's obviously relevant because he's
3 accusing Toys "R" Us in New York City of doing something that
4 would cause confusion with him in Rome, New York. The claim
5 that he's made is that Toys "R" Us' use of Candyland at its
6 store only in Manhattan was what caused this so-called
7 trademark infringement. So again, we see this litany of
8 every boilerplate objection known to man, adding -- I don't
9 know whether you would call this insult to injury or
10 whatever, that the word evidencing is too vague, as if a
11 lawyer doesn't know what evidencing means, and just refused
12 to produce anything.

13 Now as I mentioned, we finally got two boxes
14 of documents in January that apparently Mr. Purcell had back,
15 at least back in October and had at his new firm sometime in
16 early December, and after looking through those, we realized
17 that there were some follow-up discovery requests that needed
18 to be made because even those documents were not completely
19 adequate to comply with our requests and we wanted to just
20 tie a few things down. And so we served some more requests
21 to admit, we served one document request simply for a sample
22 of a product called Coco-Monds which had all of a sudden
23 appeared and we didn't know exactly what it was and whether
24 it used Candyland, so the only document request was for
25 Coco-Monds. We asked for admissions just saying that the

1 documents you've now sent us is all you're ever going to rely
2 on for sales in New York City, and then because these
3 documents were essentially Federal Express labels that just
4 showed weight and what was -- and where something was sent,
5 didn't tell us what the products were, we asked in an
6 interrogatory that he specify exactly which products were
7 sold where, because we couldn't tell that from the documents.
8 And these document, these discovery requests were served
9 January 31st, they would have been due March 2nd, the end of
10 February was the absolute discovery cutoff, and we got this
11 e-mail from Mr. Purcell on February 23rd saying that because
12 his response would be due two days over the discovery cutoff,
13 notwithstanding the fact that he had failed to produce the
14 documents for months, he was just not going to comply, not
15 going to do anything.

16 And I would ask that we recall in the context
17 of that response what your Honor had originally said in
18 August 11th, in that order prior to ordering the discovery,
19 that his position is unreasonable, the problem will be solved
20 by the court's extending discovery deadlines. To the extent
21 the plaintiff's objection to production of this information
22 is that it has been requested too late, then plaintiff should
23 produce the requested information immediately since the
24 deadlines will now be extended. And then most tellingly,
25 "This court will no longer be involved in minor disputes in

1 which it appears that the parties are simply attempting to
2 avoid or delay disclosure of information or simply arguing
3 that one party is not going to produce information because
4 the other party has not produced it." That was an
5 admonishment that Mr. Purcell clearly disregarded. He has
6 wasted enormous amounts of our time and money that Hasbro has
7 to spend on our fees and expenses with this, and we're
8 seeking sanctions for that. We think that first of all, we
9 should be -- get our attorneys' fees for the unnecessary time
10 that we've had to put into dealing with his obstreperousness.

11 Secondly, another sanction that is well
12 settled in the case law is establishing certain facts for
13 which discovery has been blocked.

14 And then on the request to admit that he has
15 not adequately responded to, the standard remedy for that is
16 to deem certain facts admitted.

17 And then at an absolute minimum we believe
18 that we should at least get the discovery we asked for, and
19 that the court has ordered a long time ago that we should
20 get.

21 On attorneys' fees, there are at least three
22 sources for that. One is in the case law including the
23 Second Circuit's Agee opinion that's up on the screen that
24 gives the courts inherent power to award attorneys' fees
25 against a party and its counsel when they've acted in bad

1 faith, vexatiously or for oppressive reasons. Rule 37 of
2 course also provides for the assessment of costs in addition
3 to other sanctions against the party failing to obey the
4 order or the attorney advising that party or both.

5 And then finally 28 U.S.C. 1927 directed
6 against attorneys and says any attorney who so multiplies the
7 proceedings unreasonably and vexatiously may be required to
8 satisfy personally the excess costs, expenses and attorneys'
9 fees reasonably incurred because of such conduct.

10 On establishing facts, the source is Rule
11 37(b)(2)(A) through (B) and what we're asking in our motion
12 is that the following facts be definitively established and
13 inconvertible: That plaintiff has not made any sales of
14 products bearing his Candyland mark outside of Upstate
15 New York; 2, there is no evidence of actual confusion by
16 consumers between plaintiff's Candyland mark and the use of
17 Hasbro's Candyland mark in the Times Square New York Toys "R"
18 Us store; 3, that plaintiff's Candyland mark does not appear
19 on any of the documents, packaging or marketing material
20 other than those already produced by plaintiff, in other
21 words he can't surprise us at trial with more. Next,
22 plaintiff has not incurred any actual damages, and finally,
23 that he's not incurred any damages in the form of attorneys'
24 fees or other legal costs as a result of the complained-of
25 conduct.

1 As to deeming certain facts admitted, we have
2 up on the screen and have mentioned in our motion a total of
3 approximately 20 requests for admission that we believe
4 should be deemed admitted because they were simply asking him
5 to look at websites, confirm what was on the websites, we
6 gave him the exact URLs and yet he said that he did not have
7 sufficient information to admit or deny. So that's what
8 we're here for, your Honor. Thank you very much.

9 THE COURT: Okay. On the issue of attorneys'
10 fees, do you have any document that shows the amount of time
11 and the fees?

12 MR. LANDSMAN: We were in the process of
13 preparing that, it's a fairly tedious process and I was
14 planning, if we got the attorneys' fees, to then submit them
15 in an attorney fee application. I think it would be at least
16 in the tens of thousands of documents -- dollars, your Honor.

17 THE COURT: Okay. What do you, off the top of
18 your head, what do you estimate, not the amount, in terms of
19 the hours, whether your hours and associates' hours and
20 paralegal hours?

21 MR. LANDSMAN: Yes, and oh, my God, I would
22 expect my hours would be 20 to 30 on these motions, associate
23 hours probably at least twice that much, and paralegal hours
24 of somewhere between mine and the associate hours. But we
25 could, we would of course submit very precise numbers and as

1 consistent with the Second Circuit's requirements, submit the
2 contemporaneous billing reports and hour reports on them.

3 THE COURT: You could do that approximately
4 when?

5 MR. LANDSMAN: Within a week. No later than
6 that. We had started on it but just hadn't quite finished
7 it.

8 THE COURT: Okay. Anything further?

9 MR. LANDSMAN: No, your Honor. We -- we have
10 a witness to call, at least Mr. Purcell, but I assume he
11 wants to do his opening, too.

12 THE COURT: Okay. Let's hear from Mr. Purcell
13 then.

14 MR. PURCELL: Thank you, your Honor. My
15 adversary is very big on argument but very low on proof. I'd
16 like to take this real slow for the court. Instead of
17 relying on my adversary's broad statements that all of this
18 discovery is the same nature and so forth, let's go through
19 one by one to see what discovery responses were made, what
20 discovery was produced and so forth, and see whether there's
21 been some egregious conduct by either my client or me.

22 First of all, your Honor, my client is
23 literally a mom-and-pop operation, it is Mr. and
24 Mrs. Haritatos running a sole proprietorship, they have had
25 three part-time employees helping out with their business.

1 This is also not the first piece of litigation between
2 Mr. Haritatos and Hasbro. These two parties went at it in
3 the Trademark Office before this lawsuit was filed in a
4 trademark opposition proceeding. Mr. Haritatos asserted his
5 registered trademark for Candyland for candy products against
6 Hasbro's application to try to register the term Candyland
7 for a variety of beverage products. The parties in the
8 Trademark Office proceeding were entitled to discovery and
9 indeed they took lots of discovery, Judge. Before this case
10 was even filed, Hasbro had engaged in tons of discovery
11 trying to find out what my client was doing and so forth and
12 indeed did find out what my client was doing.

13 If you turn to Exhibit 1 of the plaintiff's
14 exhibit binder, Judge, I have submitted my own declaration
15 and have put forth some of the discovery that went on in the
16 Trademark Office proceedings before this proceeding was even
17 filed again.

18 Direct the court's attention to Page 2, all
19 right. Hasbro served a first set of requests for production
20 of documents and things, there were 27 numbered requests in
21 the Trademark Office proceedings. They also served seven
22 interrogatories, there were nine numbered interrogatories.
23 Later on, January 26th, 2005, they served a second set of
24 requests for production of documents and things. Then in
25 January 28th, in 2005 they made a request for entry upon land

1 for inspection. February 14th, they served a third set of
2 requests for production of documents and things, there were
3 eight numbered requests there.

4 On February 15th, 2006, Hasbro actually
5 inspected the premises of my client. They went to my
6 client's candy shop and could take all the pictures they
7 wanted inside and out. All the candy was on display there,
8 whatever packaging was on display, the words Candyland around
9 the clock, anything they wanted to do, and indeed they did
10 take photographs of the inside and out of my client's candy
11 shop, to see what it was doing, what products it was offering
12 for sale and so forth.

13 Then on February 16th they also took a full
14 day deposition of my client Spero Haritatos, was 178 pages of
15 deposition transcript and 22 deposition exhibits.

16 Later on, July 8th, 2005 they served a fourth
17 set of requests for production of documents, and shortly
18 thereafter the instant lawsuit was filed, Judge. There was a
19 ton of discovery that already went on in the Trademark Office
20 proceedings. They inspected my client's premises, they took
21 a full day of his deposition, they knew what the case was
22 about, they asked everything they could about his business
23 and the history of his business and what products he made and
24 what -- how many sales he made of each type of product and
25 the wholesale, resale, they went all through that sort of

1 stuff.

2 So with that background, we now start this
3 lawsuit. And they've served a slew of discovery in this
4 lawsuit. They again took Mr. Haritatos' deposition for a
5 full day and this time there were 323 pages of transcript,
6 Mr. Haritatos' deposition, and 33 numbered exhibits, in this
7 case. They had two full days of Mr. Haritatos, they've got
8 over 500 pages of deposition transcript of him, and they've
9 got something like 50 some deposition exhibits. They took
10 Mrs. Haritatos' deposition for an afternoon, they took his
11 aunt's deposition, they took a deposition of third party,
12 they've served interrogatories, document requests, requests
13 for admission in this lawsuit in addition to what they
14 already had in the Trademark Office. We produced most of
15 this stuff, Judge, already in the Trademark Office proceeding
16 years ago. For them to come before your Honor and say, gosh,
17 we first asked for this stuff in this lawsuit and we just
18 didn't get it, and gosh, your Honor should entertain this
19 motion for sanctions or discovery long after factual
20 discovery has been cut off and completed is a bit outrageous.

21 Let's go through first your Honor's order of
22 August 11th and see what we did and didn't -- what we did and
23 did not do with regard to that order. I direct your
24 attention to Plaintiff's Exhibit 13, specifically Page 8 of
25 that order. Have it, your Honor?

1 THE COURT: I have it.

2 MR. PURCELL: In your August 11th order, you
3 address several different letter motions by the parties,
4 mostly by me, and here's the one you addressed with regard to
5 Hasbro and you order, "Hasbro has requested information,
6 including customer lists; the application for the Turkey
7 Joints registration; and information regarding damages. This
8 court finds that this information is relevant and
9 discoverable, given the protective order that has been
10 entered in this case."

11 I appealed your Honor's decision to
12 Judge Hurd, I'm entitled to do under Rule 72. My adversary
13 says, oh, no, you've got to comply with the court's order and
14 you -- it's immaterial and irrelevant what you do on appeal
15 before the District Court judge. I submit that's not the
16 state of the law. If it were the state of the law, it would
17 simply eviscerate Rule 72. There would be no need to appeal
18 a magistrate's ruling, it would be meaningless, it would be a
19 waste of everyone's time to appeal a magistrate's ruling if
20 one had to abide by the magistrate ruling before asking the
21 court judge to remand it, vacate it, clarify it, reverse it,
22 affirm it, whatever.

23 It's also noteworthy that when my adversary
24 says this stuff was due under your order, 30 days from your
25 order regardless of the appeal, September 11th came and went

1 and yet my adversary didn't say, hey, Bob Purcell, where's
2 all this stuff that you're supposed to get pursuant to
3 Magistrate DiBianco's order? We know you got to appeal
4 before Judge Hurd but that doesn't count and here's some case
5 law to say you need to turn that stuff over immediately,
6 doesn't matter if you got an appeal. They didn't do any such
7 thing, Judge. They now come before you and say that's what I
8 should have done in their opinion. Again, I don't think
9 that's the law because it simply eviscerates Rule 72. They
10 made no complaint at that point in time.

11 Let's go to Hasbro's opposition brief in
12 connection with my appeal before Judge Hurd and see what they
13 specifically told Judge Hurd they wanted. Okay. And that's
14 at Exhibit 14 and specifically starting at Page 6 of that
15 Exhibit 14, Judge. They're saying one of the things you
16 ordered was plaintiff's customers, plaintiff has refused to
17 produce documents concerning the customers for plaintiff's
18 products bearing the Candyland mark, including most
19 importantly their geographic location.

20 What your Honor ordered my client to produce
21 was customer lists. I think I informed your Honor during
22 oral argument in connection with the August 11th order that
23 my client did not have customer lists. I confirm my client
24 has never had customer lists, there are none. But in an
25 attempt to comply in good faith with your Honor's order, my

1 client did to go back to its warehouse, went back several
2 years, got all the documents it could concerning what we call
3 UPS manifests. Every time product was shipped, it was
4 shipped by UPS. My client's records, which they maintained
5 in their warehouse, they retrieved, they investigated, they
6 got them, and they photocopied them. There were almost 6,000
7 pages of those things, Judge. It took my client about four
8 days and three people working full time during those days to
9 get those documents and make the copies.

10 They sent them to me at my old law firm in two
11 big boxes. I direct the court's attention to, attention to
12 Plaintiff's Exhibit Number 30. And Judge, I represent to the
13 court these are two cardboard boxes sent to me by Mr. and
14 Mrs. Haritatos containing subboxes identified with specific
15 years in which the UPS manifests are contained and that these
16 two boxes contain about 5,593 pages of those various
17 manifests. These boxes and these pages were created by
18 Mr. and Mrs. Haritatos, I think in the late September or
19 early October time frame. I had them in my office at my old
20 law firm, anticipating that Judge Hurd would probably affirm
21 your ruling and rather than getting into some contentiousness
22 about what customer lists were, we would in good faith go
23 back for many years and get these documents from the UPS
24 manifests to show where all these products were shipped.

25 Now granted, there was some people who walked

1 in off the street to the candy shop, may have paid cash and
2 so forth that are not in the UPS manifest, but these are the
3 shipping records and the best we can possibly do to show the
4 identities and locations of customers. My client wanted to
5 get those boxes of documents to me because if Judge Hurd's
6 order presumably affirming your ruling came down in November
7 or December, they were going to be very busy with the candy
8 making season around Thanksgiving and Christmas. They said,
9 let's do it now because it's going to take a lot of our time
10 to do this and let's get it out of the way. The boxes were
11 there in my office when I left that firm in October 16th,
12 2006. I had told my secretary on at least three occasions
13 that these two big boxes which are literally 3 feet or so
14 from her desk are the shipping records for Mr. and
15 Mrs. Haritatos and we're getting these in anticipation that
16 Judge Hurd may affirm your Honor's ruling, that if he does,
17 we'll have these ready to give to the other side at that
18 time.

19 I left my law firm and joined Hiscock, Barclay
20 on October 17th, 2006. I was denied access to litigation
21 files which were still at my old law firm. Jim Muldoon of my
22 former law firm took control of the case during that period
23 of time. I was not aware of Judge Hurd's affirming decision
24 which came down after I left the -- my old law firm, the
25 Wall, Marjama, Bilinski firm, and in fact Mr. Muldoon was

1 saying that he would -- was refusing to turn over litigation
2 files to Hiscock, Barclay under any circumstance.

3 I unexpectedly received the litigation file
4 from my old law firm on about December 6th, 2006. It came
5 unexpectedly, no forewarning it was coming, in fact contrary
6 to Mr. Muldoon's previous positions. It was disheveled, I
7 had to organize this litigation file which it was extremely
8 voluminous, it probably takes up 10 shelves of space. I also
9 noted that there's basically no correspondence at all in that
10 litigation file from the time I left the firm, the pleadings
11 were scant. I discovered Judge Hurd's order and I sent an
12 e-mail to my adversary, Mr. Landsman, on December 7th,
13 informing him about the situation. That e-mail is attached
14 to my declaration in Exhibit 1, direct your Honor's attention
15 to the next to the last page of Plaintiff's Exhibit Number 1.
16 This e-mail confirms with Mr. Landsman, I just received the
17 litigation files from my old law firm, I'm trying to
18 construct the pleadings and correspondence portions. I've
19 also just been made aware that Judge Hurd denied plaintiff's
20 objections to Magistrate DiBianco's ruling though I have yet
21 to review that ruling by Judge Hurd. Would you please allow
22 me a few days to get back up to speed on this case and
23 address this matter. I believe that I have in my possession
24 two very large boxes of courier records for shipping candy
25 products but I do not know if they have been Bates stamped or

1 otherwise cataloged or if the ruling applies to other
2 documents as well. And I continue on.

3 Mr. Landsman has fortunately printed up a tape
4 recording of a voice mail message that I left with him on
5 December 14th, 2006 which is Hasbro's Exhibit 31. So a week
6 later, I called and left a voice mail message with
7 Mr. Landsman, do you have that exhibit, your Honor?

8 THE COURT: This is the Hasbro exhibit?

9 MR. PURCELL: Exhibit 31 of the defendant's
10 exhibits, Hasbro's exhibits.

11 THE COURT: I do.

12 MR. PURCELL: So I call Mr. Landsman on
13 Thursday, December 14th, "I was just calling about the
14 discovery that's due in the Haritatos case. Unfortunately
15 the litigation file I've gotten from my former law firm is
16 bereft of any correspondence and owned a handful of pleadings
17 since I left there two months ago so I'm trying to
18 reconstruct things," all right.

19 Then down the next paragraph, "Secondly, I
20 have two big boxes of Fed Ex or overnight courier stuff that
21 Spero and Sharon Haritatos got together. I think it was
22 about two months ago before I left the Wall, Marjama firm.
23 It may be some of the stuff that the magistrate's order
24 required them to produce. I haven't Bates stamped it all yet
25 but I want to let you know it's here and maybe talk to you

1 about how to get them to you expeditiously if that's the
2 stuff you want. If you want to come up here and take a look
3 at it," faded off, let me know. "Anyway, please give me a
4 call at my new office in Syracuse," here, okay.

5 I offered to produce the documents to
6 Mr. Landsman and as your Honor knows, production means only
7 produce them for inspection and if they seek to copy them,
8 they can decide to copy them. I was making them available to
9 Mr. Landsman as early as reasonably possible once I got them
10 in my possession, and instead of trying to work things out,
11 we see unfortunately a -- my later string of e-mails between
12 my new law firm, Hiscock, Barclay, and Mr. Landsman's law
13 firm down in New York City.

14 Those e-mails start in Plaintiff's
15 Exhibit Number 25, 26, et. seq., would -- I'd like to direct
16 your attention to Exhibit 25.

17 THE COURT: Go ahead.

18 MR. PURCELL: All right. This series of
19 e-mails will reveal that starting in January 1st,
20 Mr. Landsman demanded that I make photocopies of the
21 documents and provide them to him. Told him that there were
22 about 6,000 pages, my client, you know, was not prepared to
23 absorb the cost of that photocopying. It was one thing for
24 him to have provided copies of documents before when we were
25 talking about tens or even hundreds of things, but there was

1 almost 6,000 pages of documents. So do you want to pay for
2 them, you'll see some bickering in the e-mails back and
3 forth, Judge, in the first few days of January, where
4 eventually Mr. Landsman's law firm says, okay, send these
5 documents out to an outside photocopying service called
6 Avalon, right here in Syracuse, and have Avalon make copies
7 of those and put them on a CD for us, a disk, all right. And
8 that's what we did. And finally Mr. Landsman's law firm
9 agreed to bear the cost of 900 and some dollars for Avalon to
10 make those copies. Avalon sent the disk I understand to
11 Mr. Landsman's law firm on January 11th, 2007. There was no
12 bad faith involved in trying to ignore your Honor's ruling or
13 Judge Hurd's affirmance of your ruling. There was every
14 attempt to try to get these things over to my adversary as
15 soon as reasonably possible and to cooperate with them in
16 getting the documents to them.

17 It was unfortunate my former law firm which
18 was handling the case denied me access to those files during
19 that period of time and perhaps they should have done
20 something themselves to speed things along and comply with
21 that order, but Mr. Landsman's request here is to try to
22 punish my client or to punish me for that, and I think that
23 would be extremely unfair to do that under the circumstances,
24 Judge.

25 It also is noteworthy that we did not try to

1 literally interpret your Honor's ruling to produce customer
2 lists because we don't have any, we tried in good faith and
3 spent many days by many people searching for, obtaining and
4 copying these records and eventually getting them over to
5 Mr. Landsman.

6 Let's go to the next thing, and going back to
7 Exhibit 14 which is Hasbro's opposition to my appeal to
8 Judge Hurd on Page 8, the second category is Mr. Haritatos'
9 sales and revenues. First of all, it's very unclear to me
10 that your Honor ordered anything to be produced with regard
11 to Mr. Haritatos' sales and revenues. But we had already, I
12 think even in the Trademark Office proceeding, provided him
13 with copies of Mr. Haritatos' income tax returns for several
14 years. Those income tax returns showed the revenues,
15 expenses and so forth of his business, his only business
16 which was the Candyland business over several years. They
17 were already provided to them long ago. To the extent that
18 they even wanted more information such as the UPS manifests
19 and identification of the customers and so forth, they
20 obviously got that.

21 The next thing they want is nonparty use of
22 the Candyland mark. Again, it's unclear that your Honor's
23 order of August 11th ordered anything about this sort of
24 thing, but that was also already produced. That means
25 somebody was using Candyland other than the parties in this

1 lawsuit and whatever we had, Judge, I think we produced to
2 the other side. I don't think they can point to anything
3 that we withheld, they haven't even argued that today.

4 The next thing is category 4, the alleged use
5 of Hasbro's Candyland mark by Toys "R" Us. All right,
6 they're asking Mr. Haritatos to produce to Hasbro copies of
7 documents pertaining to the co-defendant Toys "R" Us' use of
8 the mark. Now keep in mind, Judge, that Hasbro was the
9 company that licensed Toys "R" Us, those two companies are in
10 cahoots with each other, yet they're asking my client to
11 provide them with stuff pertaining to the Toys "R" Us use of
12 the Candyland mark.

13 The things that we have are two categories.
14 One is they are the things that Toys "R" Us and Hasbro
15 themselves produced to us in this litigation or in the
16 Trademark Office litigation, and two, there is a website
17 printoff that I personally made of the Toys "R" Us website
18 that I maintain is work product. That's what I've got,
19 that's what I told them that I've got in regard to this.
20 There's nothing Mr. Haritatos has in addition to those two
21 things I just told you about. Again, they're not here today
22 complaining about that or contending that we have something
23 that we withheld in that category.

24 If we turn the page to Page 9 of Plaintiff's
25 Exhibit 14, let's see the next category that Mr. Landsman was

1 telling Judge Hurd that something that you ordered to be
2 produced, and indeed this one you did order, Judge. The Nora
3 Haritatos application to register the original thin-shell
4 candy Turkey Joints mark. You did order it, Judge Hurd
5 affirmed that order. They haven't come here today saying
6 that we had documents we didn't produce. But nevertheless
7 they told you and they told Judge Hurd that we hadn't given
8 them any documents respecting this trademark application.
9 That simply was untrue. We gave them what we had.

10 Let's go to Plaintiff's Exhibit 22, please,
11 your Honor. This is a printout that I obtained from the
12 United States Patent and Trademark Office database of the
13 Nora Haritatos application to register the original
14 thin-shell candy Turkey Joints mark, all right. This is
15 available to the public, from the Trademark Office database,
16 all right. This is the registration at issue.

17 Let's look at a couple things here, Judge.
18 First of all, you don't see the word Candyland anywhere.
19 This lawsuit's about the trademark Candyland, not about the
20 Turkey Joints, not about thin shell or any of that sort of
21 stuff, it's about Candyland. I maintain that this request
22 was irrelevant, but nevertheless I had already given to them
23 what we had with regard to this application registration.

24 Let's look more carefully at this
25 registration, Judge. At the bottom of the first page of

1 Exhibit 22, you will see that the registration issued on
2 November 2nd, 1976, over 30 years ago, and we turn the next
3 page, what the database tells us is that this registration
4 was canceled on March 29th, 1983, went dead, was dead, about
5 25 years ago. So when I asked Mr. Haritatos to, you know,
6 well, even though it's not relevant, let's just get the stuff
7 that pertains to this registration, whatever you got, Spero,
8 let's produce it, here's something that we have here, we go
9 to Exhibit 23, Judge. I sent to Hasbro's attorneys by letter
10 dated June 1st, 2006, some documents that were Bates stamped
11 as originating with Mr. Haritatos. And if, as I have also
12 attached some of those documents bearing those Bates stamp
13 numbers on them and you will see that these documents pertain
14 to the Nora Haritatos application that we've been talking
15 about, and they're one, two, three, four, five, six, seven,
16 looks like there's about eight pages, including a three-page
17 copy of the application itself that Mr. Haritatos had found
18 somewhere in his records going back 30 years, Judge, that
19 we'd already produced to Hasbro on June 1st, 2006. And they
20 have the audacity to come before you later, Judge, and ask
21 you for an order of August 11th, 2006 and tell you that we
22 hadn't given them any stuff on this application when in fact
23 we'd given them already what we had.

24 Let's go to the next category of what Hasbro
25 believes you ordered in your August 11th order as reflected

1 in their opposition brief before Judge Hurd which again is
2 Plaintiff's Exhibit 14, and I'm looking again at Page 9.
3 This category is Mr. Haritatos' legal expenses. And this is
4 a fairly unique and distinct type of category of damages,
5 Judge. What Mr. Haritatos is seeking as one element of
6 damages in this lawsuit is his legal fees in connection with
7 the Trademark Office opposition proceeding that he brought
8 against Hasbro. To my personal knowledge there is only one
9 case decision addressing this issue. It comes out of the
10 First Circuit Court of Appeals and it firmly stated that such
11 type of damages are recoverable for trademark infringement
12 where the plaintiff prevailed in a trademark infringement
13 case, he was able to recover his legal costs associated with
14 the litigated proceeding in the Trademark Office. So I had
15 First Circuit authority for that. They say, okay, provide us
16 with all documents concerning those legal expenses, all
17 right.

18 Now some of those documents of course, Judge,
19 include the correspondence between the parties in the
20 Trademark Office litigation, the pleadings in the Trademark
21 Office litigation, the deposition transcripts and exhibits in
22 that Trademark Office litigation. All those things concern
23 in a broad sense the legal fees. What they additionally
24 wanted and interpret your order as requiring was
25 Mr. Purcell's bills and day notes, all right. Now first of

1 all, I don't know what day notes means, I've been practicing
2 law for 30 years, I don't know what day notes means. I do
3 know what the bills were and we did address that with your
4 Honor and before Judge Hurd. I have no problem in turning
5 those invoices over to my adversary, except for the fact that
6 the time entries on those invoices might reveal, well might
7 reveal attorney-client privileged information. And I just
8 couldn't turn those over without some sort of okay by my
9 adversary or the court, okay, saying mask out what you rule,
10 believe in good faith is attorney-client information;
11 otherwise turn it over or things of that nature.

12 I would be happy, Judge, to find those
13 invoices, to turn them to the court in camera to let the
14 court determine what's attorney-client privilege, mask out
15 whatever the court feels is appropriate and turn them over to
16 the other side. But I admittedly did not produce those
17 invoices to my adversary in response to either your order or
18 Judge Hurd's order but I think it's for obviously a very,
19 very good reason, and I'm not trying to be obstreperous.
20 I've tried to offer that to my adversary, to accept masked
21 copies, they simply won't do that.

22 THE COURT: What type entries are you
23 referring to?

24 MR. PURCELL: Well, in connection with my
25 bills to my client Spero Haritatos in connection with the

1 Trademark Office proceedings, naturally there's an entry for
2 the date services were rendered, the amount of time spent on
3 those services and a description of the services which could
4 be doing legal research on certain issues, communicating with
5 client about settlement and so forth, maybe communications
6 with potential witnesses or experts, that sort of thing may
7 be revealed and well may be revealed in those invoices, as
8 well as of course a running tally of the hourly rate --
9 disbursements and so forth which, you know, are I don't think
10 going to be troublesome.

11 I also should bring to the court's attention
12 that this issue is probably moot at the moment. Judge, back
13 up. The defendants here moved for summary judgment before
14 Judge Hurd several months ago. They made three arguments.
15 They first argued that Mr. Haritatos had a mark Candyland
16 that was generic and therefore he had no rights in the
17 trademark Candyland despite the fact that the Trademark
18 Office had granted him a registration. Judge Hurd said, no,
19 I think that there's plenty of evidence here that his mark is
20 protectable.

21 Secondly, they argue, well, even if he does
22 have some protectable registered rights in this mark, Judge,
23 there could be no possibility of a likelihood of confusion in
24 this case, you know, we are the mighty Hasbro and Toys "R"
25 Us, the company up in Rome, nobody would possibly be

1 confused, have a likely confusion between us using Candyland
2 for candy products and Mr. Haritatos using Candyland for
3 candy products. Judge Hurd was unpersuaded, no, looks like
4 there's plenty of evidence here to go forward for trial.

5 Their third argument was, but Mr. Haritatos
6 isn't entitled to damages. Why? Because he allegedly can
7 come forward with no evidence of actual confusion, people
8 being actually confused between the two companies or the
9 products. Judge Hurd decided that, well, that's not really
10 the issue, but the real issue in Judge Hurd's mind was that
11 the Second Circuit law said that the infringer must engage in
12 infringement in a willfully deceptive manner, almost like a
13 counterfeiting type situation, and since we did not have
14 sufficient evidence to show the defendants engaged in willful
15 deceptiveness, he granted their partial summary judgment
16 motion denying us a request for damages.

17 I asked for reconsideration saying the judge
18 was relying upon a case that nobody had cited, I commented to
19 the judge in motion for reconsideration that prior Second
20 Circuit law and subsequent Second Circuit law used a totally
21 different standard such as willfulness or bad faith. He
22 denied my motion for reconsideration but granted my request
23 to certify the issue for interlocutory appeal before the
24 Second Circuit. Currently I have a request for the Second
25 Circuit to take up the appeal of this issue about whether my

1 client's entitled to damage recovery in the absence of a
2 showing of willful deceptiveness, especially in a case such
3 as this involving reverse confusion.

4 Judge Hurd, as you know, has stayed this
5 litigation pending the outcome of that potential
6 interlocutory appeal. So right now as the case stands, there
7 is no right of my client to seek damages.

8 All right. Let's go next to these things
9 that -- these things, discovery they served at the end of
10 January and couldn't get it served on time which they say was
11 I think Mr. Landsman's word was they served them late
12 because, because we didn't get these two boxes of UPS
13 manifests to them earlier.

14 In the context of this, Judge, you had, had
15 really brought -- one of us brought a discovery dispute
16 before you, there was an earlier discovery cutoff date of I
17 think May of 2006 or something. And Hasbro had belatedly
18 served discovery back when the discovery cutoff date was I
19 think May something, 2006. And I objected, your Honor said,
20 well, we're going to take care of that by extending the
21 factual discovery deadline, discovery cutoff date so answer
22 those, Mr. Purcell, which I did at that time. All right.

23 But at that point in time, Judge, they were
24 obviously alerted by me to this local court rule which says,
25 get your paper discovery served in time so that the responses

1 are due before discovery cutoff date. It's not only in the
2 local court rules, they had a prewarning from me months
3 before in the case that, hey, I objected to this paper
4 discovery because earlier it wasn't served before the
5 discovery cutoff date, and here they go again. They make no
6 excuse as to why they waited so long to serve the discovery,
7 why they didn't ask the court to extend the discovery cutoff
8 date at least in part. Just during the discovery period they
9 could have moved and said, Judge, you know, we know we served
10 these things late, they're not that onerous, could you please
11 extend the discovery cutoff date for just these few things if
12 you would, please, but they didn't do that. They didn't ask
13 your Honor for any extension of discovery cutoff date.

14 After the discovery cutoff date came and went,
15 then they come back and say, oh, let's go backwards, can you
16 order them to answer these things. Let's go through them.
17 One of them is at Plaintiff's Exhibit Number 32. I'm
18 directing your attention to the second page of that
19 Exhibit 32. Keep in mind, your Honor, that my adversary said
20 they couldn't get this discovery out the door because they
21 were waiting and waiting and waiting for those UPS manifests.
22 This interrogatory says, identify each product or goods sold
23 by plaintiff from 1995 to present. For each product or good
24 identify the following, it's got a list, all right. What
25 does that have to do with UPS manifests or customer list and

1 that stuff? Nothing.

2 Interrogatory number 14 on the same page,
3 state whether the product Coco-Monds, sold on the website,
4 has the word Candyland. What does that have to do with the
5 UPS manifests, customer list? Nothing. There was no reason
6 not to get these out the door earlier.

7 And then what really galls me about this,
8 Judge, is interrogatory number 13. Let's compare
9 interrogatory number 13 with the very first interrogatory in
10 this lawsuit which is at, let's see, Exhibit Number 7 in the
11 defendant's binder. We'll see that there's a big overlap and
12 duplication here, Judge. Forget about the fact that the
13 Trademark Office proceedings had similar interrogatories by
14 Hasbro, they now have an interrogatory number 13, first
15 served at the end of January 2007 which is duplicative of
16 something they basically already asked in other
17 interrogatories and of course stuff that they asked
18 Mr. Haritatos about in two separate depositions.

19 THE COURT: Which interrogatory number are you
20 referring to?

21 MR. PURCELL: I'm looking at interrogatory
22 number 1 starting on Page 4 of Defendant's Exhibit Number 7.
23 Okay. So number 1 says, "Identify separately each product
24 produced, distributed, marketed, or sold or intended to be
25 produced, distributed, marketed, or sold in connection with

1 plaintiff's Candyland mark, and for each such product," okay,
2 "identify the date," let's just take it. So comparing with
3 interrogatory number 13, "Identify each product or good sold
4 by plaintiff from 1995 to present. For each product:" In
5 response to interrogatory number 1 on Page 5, of course we
6 make the boilerplate objections but then we say the products
7 include a hard-coated chocolate candy known as Turkey Joints,
8 peanut brittle, nonpareils, chocolate and nut clusters,
9 caramel and nut clusters, chocolate novelties, Easter-themed
10 chocolates, caramel corn, fudges, truffles, chocolate
11 suckers, hard candy suckers, and ice cream. Approximately
12 90 percent of plaintiff's sales have been from the Turkey
13 Joints candy with other products contributing about 1 percent
14 each of total sales, all right. Sounds pretty similar to
15 what interrogatory number 13's asking, Judge.

16 Then they ask, "Identify the date and
17 circumstances of actual or intended first use," and after the
18 boilerplate stuff we tell them, looking at the bottom of
19 Page 5, I think it's one of the things they highlighted on
20 the screen for you, Judge. "The mark was first used in
21 connection with the Turkey Joints candy about 1919, is
22 believed to have been first used in interstate commerce at
23 about that time. The mark was first used in connection with
24 the other products except ice cream since at least as early
25 as 1975 and is believed to be first used in connection with

1 those products at least as early as 1945. It is believed
2 that the mark was first used in interstate commerce in
3 connection with the other products except ice cream since at
4 least as early as 1975, and is believed to have been used in
5 interstate commerce in connection with such products since at
6 least as early as 1945. The mark was first used in
7 connection with ice cream in late April or early May 2004 and
8 is believed to have been first used in interstate commerce
9 shortly thereafter."

10 That's pretty clear, Judge, and considering
11 the facts of the age of my clients, they can't be very well
12 compelled to try to get a better date than 1945 or 1930.
13 They simply aren't that old, Judge, they're trying to do the
14 best they can from reconstructing the records and knowing
15 what their parents and family members have said about the
16 uses of the mark.

17 And we look at their interrogatory number 13e,
18 says, "The percentage of plaintiff's total revenue
19 represented by the sale of each product from each year the
20 product was sold." Well, I already told them that in
21 interrogatory number 1, we said, 90 percent of plaintiff's
22 sales have been from the Turkey Joints candy with the other
23 products contributing approximately 1 percent each of total
24 sales. And they've taken his deposition for two solid days,
25 Judge. And they come here and tell you, Judge, they couldn't

1 have served this interrogatory because they're waiting,
2 waiting, waiting for the UPS manifests and the two boxes to
3 get to them.

4 Let's look at interrogatory number 3, or I'm
5 sorry, Plaintiff's Exhibit Number 33, this is another piece
6 of paper discovery they served at the end of January
7 belatedly. Just take a glance at some of these. These are
8 requests for admissions. "You," Mr. Haritatos, "have no
9 evidence of customers in New York, New York to whom you have
10 sold goods via mail order or otherwise outside your store in
11 the past five years other than those identified in your
12 January 11th, 2007 production of documents numbered," such
13 and such. Did this really have to wait, Judge? They
14 couldn't have served it on January 14th or 20th on time?
15 They say, oh, because they got the stuff on January 11th, it
16 took them until January 31st to get this request for
17 admission out the door. Took them 20 days after they got the
18 documents, it took them 20 days to ask Mr. Haritatos, admit,
19 admit that the only evidence that you have or documents that
20 you have of these sales in the New York, New York area are in
21 that batch. I think that's disingenuous, Judge.

22 THE COURT: Why is it disingenuous?

23 MR. PURCELL: Because the evidence can be
24 other than documentary evidence, Judge. Mr. Haritatos has
25 testified that there was one particular customer in the Long

1 Island area that he believed satisfied the New York City area
2 who came up I think with her station wagon, bought the stuff
3 and took it back with her station wagon, all right. It's one
4 of those very unique sort of walk-in customers and that's in
5 his deposition testimony, for example.

6 THE COURT: So you would simply deny the
7 admission, request for admission.

8 MR. PURCELL: Yes.

9 THE COURT: But you're contending that it took
10 them two weeks to examine hundreds of documents and that was
11 unreasonable?

12 MR. PURCELL: They didn't have to examine
13 those documents in order to formulate this request for
14 admission, Judge.

15 THE COURT: Didn't the documents concern
16 customers?

17 MR. PURCELL: Yes, they did.

18 THE COURT: The documents that you sent in
19 mid-January concerned customers?

20 MR. PURCELL: Yes, they did.

21 THE COURT: So isn't this referring to
22 customers?

23 MR. PURCELL: Yes.

24 THE COURT: So what's so disingenuous about
25 this particular interrogatory?

1 MR. PURCELL: I don't think you need to review
2 5,593 pieces of paper to finally say, hmm, I guess I better
3 ask this request for admission. This request for admission
4 was on their tongues probably before we even produced
5 anything, Judge, okay.

6 THE COURT: I don't see the point. Go ahead.

7 MR. PURCELL: Okay. All right. Next, let's
8 go to Plaintiff's Exhibit Number 34. This is the third piece
9 of paper discovery that they say couldn't have been done
10 because of plaintiff's delay in getting the documents of the
11 UPS manifest to them.

12 THE COURT: I didn't hear that argument. I
13 heard Mr. Landsman say that after we reviewed those
14 voluminous documents, further discovery came to mind or
15 further discovery was in order, I didn't hear him say what
16 you just said.

17 MR. PURCELL: This is interesting, I didn't
18 hear him say what you think he said, Judge. But my
19 recollection is that he went on the website and learned
20 something about these Coco-Monds. Well, the website has
21 nothing to do with the UPS manifest, Judge, and now we've got
22 Exhibit 34 which is another request for documents and things
23 pertaining to the Coco-Monds which he told us today when and
24 how he first came to know about the Coco-Monds stuff which he
25 said was from the website. I believe that's what he said

1 today, Judge, and it wasn't from anything to do with UPS
2 manifests, and here we have a request for documents and
3 things directed again to the Coco-Monds stuff.

4 Let's --

5 THE COURT: Let's take a short recess at this
6 point and reconvene at 11:30.

7 THE CLERK: Court recesses.

8 (Whereupon a recess was taken from 11:21 a.m.
9 to 11:38 a.m.)

10 (Mr. McGowan left the proceedings.)

11 MR. PURCELL: Thank you, your Honor. Picking
12 up the last point of argument, your Honor, you asked me
13 wasn't it reasonable to infer that the request for admissions
14 served by Hasbro January 28th, 2007 were really timely
15 considering the production of UPS manifests on January 11th.
16 I countered by saying that, Judge, this was probably already
17 in their mind regardless of what that production of documents
18 actually showed, and I'd like to show you what Hasbro was
19 thinking months before then, Judge.

20 If we refer to plaintiff's, I'm sorry,
21 Hasbro's Defendant's Exhibit 13, this is Mr. Haritatos'
22 response to Hasbro's first requests for admission. These
23 requests were served September 15th, 2006. And if you look
24 at Page 7 of the responses, direct your attention to request
25 number 10 and request number 11. Request number 10 says,

1 "You," Mr. Haritatos, "do not sell any goods to any retail
2 customers for resale outside of New York State.

3 "See the general objections. Plaintiff
4 objects to the request as being vague and indefinite, since
5 plaintiff understands that by definition of a 'retail'
6 customer is a customer that does not resell an item. To the
7 extent that plaintiff understands the request, it is
8 admitted."

9 Number 11. "You," Mr. Haritatos, "do not sell
10 any goods to retail customers for resale in New York City."

11 Basically the same objection and the same
12 admission.

13 Hasbro was thinking about this stuff months
14 before, Judge, they were concentrating on what's the evidence
15 you have of sales and so forth in New York City. They had
16 requests for admissions, they were deposing Mr. Haritatos
17 about that, he told them about this woman in Long Island and
18 so forth, and for them to come before you and say, gosh, we
19 weren't really sure we wanted to ask those requests for
20 admission on January 28th until we had a full opportunity to
21 look through the entire 5,593 pages of documents is
22 disingenuous I submit to your Honor.

23 They also complain that Mr. Haritatos has
24 improperly responded to their requests for admissions
25 regarding some third-party uses of the term Candyland in

1 connection with candy or confectionary products that they
2 found on the internet. Now here's what Hasbro did, your
3 Honor. They had their attorneys searching the internet to
4 see if there was anybody using Candyland as a trademark out
5 there for some products. They found some things on the
6 internet and they produced to us certain website pages, all
7 right. And they then say, well, these website pages in their
8 opinion show that some third parties have been using the term
9 Candyland in connection with candy products and that's
10 important in the lawsuit for some reason they say.

11 They presented this argument to Judge Hurd in
12 connection with motion for summary judgment, he was
13 unpersuaded. What they try to do through these requests for
14 admissions is to get Mr. Haritatos to perform an
15 investigation of potential third party uses of the term
16 Candyland, then based upon his compelled investigation of
17 those third-party activities, answer the interrogatories in
18 the way that my adversary wants him to answer them.

19 It is unprecedented, your Honor, to say that
20 in responding to request for admission you must compel, you
21 must say that, oh, I not only have to tell you what I know
22 about my own activities and what I have within my own
23 possession, custody, control my own employees do but now
24 you're saying I've got to go and investigate, whether it's
25 the computer or by traveling down the road or whatever, I've

1 got to go and look at some third-party things, seek it out,
2 look it out and then I have to tell you what I think that
3 third party's doing and I've got to admit it in the way that
4 you want me to have it admitted.

5 Let's go through some of these in the
6 responses to the requests for admission. Again it's
7 Plaintiff's Exhibit Number 13. And we'll start with number
8 18 on Page --

9 THE COURT: 9.

10 MR. PURCELL: 9, yes, thank you. "You,"
11 Mr. Haritatos, "have never notified a business by the name of
12 Candyland, Inc. located in St. Paul, Minnesota, that its use
13 of the term Candyland infringes your rights in your Candyland
14 mark." Admitted.

15 19, "Candyland, Inc. in St. Paul, Minnesota
16 offers candy for sale via the internet at," this website. He
17 lacks knowledge and information. Does he know Candyland,
18 Inc. is doing it? Do they, does he know that Candyland, Inc.
19 is located or is in St. Paul, Minnesota? Does he know it's
20 really offering candy? Is he supposed to investigate this
21 and come to some conclusion as to what they are and are not
22 doing, where they're located, whether that's really a
23 corporate entity, Candyland, Inc. and that's really the
24 entity behind the supposed website and so forth?

25 They go on and on and on, Judge, these same

1 sets of requests for admission go over and over on different
2 third-party websites throughout these requests for
3 admissions. That's the ones they're saying that we didn't
4 respond to properly. I submit we -- first of all, we are not
5 under any obligation under the Federal Rules of Civil
6 Procedure to make such an investigation of third-party
7 activities for our adversaries, try to compel us to respond
8 to requests for admissions in the way they want us to. I
9 also --

10 THE COURT: Well, probably in an ordinary case
11 litigation you may be correct, but isn't it a principle of
12 the patent and trademark law that if you allow someone else
13 to use an infringing device or a mark, that that dilutes your
14 claim that some defendant using the mark is infringing on
15 your rights?

16 MR. PURCELL: There is a general body of law
17 to that effect, your Honor, however, it is not the law that
18 your failure to so-called police your trademark against
19 infringers is going to eviscerate your trademark rights. It
20 would have to be so pervasive and wholesale to render your
21 mark basically protectionless that it would -- you'd have to
22 have a situation like the Thermos bottle basically where it
23 was so widespread, use of the term Thermos by third parties
24 in a generic sense that the rights in Thermos were
25 eviscerated. Contrast it also with Xerox. People for years

1 have said Xerox machine, Xerox copy and so forth and it might
2 be an SCM machine or an IBM photocopy machine but they still
3 call it a Xerox machine. And even with such widespread use
4 of the term Xerox by other people when not referring to goods
5 of the trademark owner, that's not sufficient to say, oh, you
6 don't have anymore trademark rights, protectable rights in
7 the term Xerox.

8 I realize where my adversary is trying to go
9 with this, but -- and he may, you know, present that evidence
10 at trial if he wants to, but to try to force my client to
11 take his investigation and say my client has to undertake the
12 same investigation, not just stuff that he's doing, I think
13 is too far, your Honor. And it's also too far when you look
14 at the specific request for admission and say admit that it's
15 located in the city. Does my client know where it's located?
16 I'm willing to stipulate, Judge, I can stipulate that these
17 website pages were in fact found and are true and accurate
18 authentic copies of website pages obtained by my adversary
19 counsel on such and such a date, I'm willing to stipulate to
20 that. We'll see if Judge Hurd wants to admit that into
21 evidence or what weight the jury or judge want to give to
22 that evidence, that's fine. There's not a problem in trying
23 to keep that evidence out.

24 It's the way these requests for admissions
25 were framed, Judge. And when we look at the specific

1 requests for admissions you can see why my client and I,
2 quite candidly, answered it the way we did. And I think that
3 to say, oh, it's not sufficient for you just to say what, you
4 know, is in your own knowledge, your company's knowledge or
5 your employees' knowledge but you've got to go out there and
6 beat the bushes for the evidence and then tell me what you've
7 found and if I don't like what you say you found, well then
8 I'm going to go to the judge and tell the judge you haven't
9 been really honest in answering the requests for admissions.

10 THE COURT: Didn't sound to me that Hasbro was
11 complaining about the requests to admit which had been
12 admitted. Sounded to me that they were complaining about the
13 requests to admit that were ignored.

14 MR. PURCELL: None of these have been ignored,
15 Judge.

16 THE COURT: Well, I can see that but I didn't
17 hear Hasbro's argument as saying that we're complaining about
18 the fact that plaintiff admitted something. Go ahead.
19 Please move on.

20 MR. PURCELL: Well, we continue on, it's, for
21 example, request for admission number 20, "You have reason to
22 believe that Candyland, Inc. in St. Paul, Minnesota uses the
23 term Candyland in connection with the sale of candy.
24 Denied." What reason do we have to believe it? Oh, no,
25 you're supposed to go out there and beat the bushes and make

1 some sort of assessment. I don't think that's what the
2 Federal Rules of Civil Procedure require us to do and
3 certainly don't compel us to do some sort of perfect
4 investigation that Hasbro itself apparently hasn't done and
5 can't do. But again, we're willing to offer to stipulate
6 that these website pages are true, accurate, authentic copies
7 of things they got from the websites on such and such a date,
8 Judge.

9 THE COURT: You may be correct in that
10 contention, but there are much larger issues here which you
11 need to address. The issues of the August 11th order and
12 Judge Hurd's order and things like that.

13 MR. PURCELL: Yes. Next my adversary says
14 that, for example, we did not provide samples of our product,
15 each one of our different products to them, that it was an
16 improper objection, that we are stonewalling discovery and so
17 forth, Judge. Let me address that.

18 We provided photographs of many of our
19 products to them, I think it was in connection with the
20 Trademark Office proceeding, if not this proceeding. We also
21 allowed them to come onto our premises and take the
22 photographs of all the candy in the candy displays, the
23 package candy and so forth there, they had pictures of them.
24 There's also pictures of some of the products on our website,
25 free to them, free to the public. We told them, look at our

1 website. We told them, look at the photographs. We told
2 them take the photographs of the stuff. Nevertheless they
3 say no, no, no, they really want the products, they really
4 want a couple of the chocolate-covered nut clusters, I mean
5 really, Judge, they really want two pieces of candy? Are
6 they going to do some chemical analysis on it? What are they
7 going to do with that stuff? Is that reasonably calculated
8 to lead to discovery of admissible evidence? I don't think
9 so.

10 Mr. Landsman gave a little clue, he says,
11 we're not really interested in the candy, we're interested in
12 what it comes in, the packaging. Well, that's not what their
13 request was. The request was for samples and to the extent
14 that you have requested the packaging, samples of packaging,
15 we provided copies of that to you way back in the Trademark
16 Office proceeding. And you've had a chance to see our
17 packaging by coming into the premises during the Trademark
18 Office proceeding and taking all the photographs you want of
19 what's there.

20 How can it possibly be that we are bad people
21 because we resist providing two samples or three samples,
22 whatever they want of the actual candy themselves when they
23 got photographs of everything, they've got written
24 descriptions of the candy, they're permitted to take
25 photographs themselves of the candy, and the packaging

1 sometimes itself says what's in the packaging. It's --
2 there's a point where it becomes absurd, Judge, and I think
3 that's where my adversary is in advocating that we've engaged
4 in some bad faith by saying we don't think you really need
5 the samples.

6 To the extent that they want updated sales
7 records and so forth, Judge, we can probably provide them
8 with copies of the last year's income tax returns, if it
9 needs to be updated we'll supplement that stuff. Obviously
10 not, without a trial date, we try to supplement stuff sort of
11 all at once within reasonable time period rather than
12 piecemeal but if they want us to supplement that and update
13 that, we will. Perhaps they will return the favor and
14 supplement all of their discovery responses too and
15 production.

16 Your Honor also asked a good question of my
17 adversary and that is there is no evidence, no documents, no
18 exhibits, no testimony to be offered by my adversary here
19 today regarding the amount or nature of their requested
20 attorneys' fees in connection with this matter, and it seems
21 that your Honor set forth an evidentiary hearing on this
22 whole matter and for my adversary to say, well, we don't care
23 what you want, Judge, we're just going to do this piecemeal
24 is improper. And if they really had a true request for
25 attorneys' fees, I think your Honor's order compelled them to

1 make that request and present that evidence here today so
2 we'd have it out all at once. The fact that they haven't
3 done so should be a waiver of any request for attorneys'
4 fees.

5 I think that I've covered all the points
6 raised by my adversary but I solicit my adversary to point me
7 to any particular interrogatory response, document request
8 response, request for admission response, or any other aspect
9 of the August 11th order that they think I have not addressed
10 in my opposition argument here.

11 MR. LANDSMAN: Your Honor, I would like to
12 briefly respond to Mr. Purcell that I intend to put him on
13 the stand and there will be more than enough time to get into
14 that level of detail.

15 THE COURT: Anything further in your argument,
16 Mr. Purcell?

17 MR. PURCELL: Not if my adversary thinks I've
18 covered each objectionable --

19 THE COURT: We'll turn back to Mr. Landsman.

20 MR. PURCELL: Thanks.

21 MR. LANDSMAN: I didn't -- just a few quick
22 points, your Honor. First of all, I am stunned and outraged
23 that on March 4th, 2008, Mr. Purcell is arguing about the
24 relevancy or significance of the requests that he was ordered
25 to produce on September 11th, 2006. This is just not the

1 time and place to get into that. He's had more than enough
2 time to do that before, and I'm not intending to respond
3 about the relevancy, that's long past.

4 Secondly, this point about Rule 72 and his
5 point that it would eviscerate 72(a) and his right to object
6 if he had to move to stay rather than simply obey it, think
7 about what that would mean in an appeal from the District
8 Court. He's -- if it eviscerates 72(a) to say you have to
9 obey the order or seek to stay it while you're appealing it
10 to the district judge, you would be eviscerating the right of
11 appeal to the court of appeals by saying that you have to
12 move to stay the District Court's order while you appeal it.
13 That's what we do in these proceedings.

14 As to this, the January 11th production and
15 whether we were bickering about the price, I would simply
16 point your Honor to --

17 THE COURT: January 11th request.

18 MR. LANDSMAN: I'm sorry, his production of
19 documents finally on January 11th, 2007. His Exhibit 27
20 which has various e-mail chains and it includes on Page 2 of
21 3 where he says he's responding to my voice mail of the 18th,
22 documents have not been Bates stamped or marked confidential,
23 that's what he's got to do before he proceeds to produce
24 them. My response is at the top of that page, and it says if
25 the -- "If the boxes which you state in your voice mail had

1 been in your possession for two or more months, certain
2 documents should have been produced and you should obviously
3 have produced them immediately," and then I say bill us for
4 that if you wish. I never quibbled about paying for this.
5 We'd never been asked to do that before, that had not been
6 the custom in this case but I said bill us if you want to.

7 Now, there was some discussion in
8 Mr. Purcell's remarks about problems with his old firm and he
9 had the documents before he left his old firm, he doesn't say
10 how long before he did, he had -- he got the documents from
11 his old firm sometime in the first week of December. But the
12 problems with his old firm just don't matter here because,
13 first of all, they were due September 11th which is long
14 before he left his old firm under your order. Two, if he had
15 a problem with his former firm that prevented compliance with
16 either your order or Judge Hurd's order, he should have come
17 to the court and asked to be relieved of it and explain why.
18 Secondly, even if he didn't get them till the first week in
19 December, there's no excuse for not turning them over
20 quickly, and bear in mind that he's saying that we didn't
21 move quickly enough between getting 5,000 documents on
22 January 11th and sending them a request on January 31st, but
23 he took five weeks to produce these documents to us that were
24 due months ago under a court order.

25 And finally, and that's -- that is the final

1 point, that having egregiously missed court-ordered deadlines
2 by months to then say that our requests come two days too
3 late is just exactly the kind of thing that should not be
4 tolerated here.

5 Now finally, he says that it is unprecedented,
6 and I think that was his term, for a party to be required to
7 actually do some investigation in response to a notice to
8 admit. And the really simple answer to that actually is
9 right there in the Federal Rules in the commentary, and the
10 answer also to his saying that he can deny something because
11 he quibbles, for example, with, well, I don't know if it's
12 Candyland, Inc., it says Candyland, Inc. on the website but I
13 don't know that it's in fact a corporation so I can deny the
14 whole thing, that's all covered.

15 Rule 36 says the answer shall specifically
16 deny the matter or set forth in detail the reasons why the
17 answering party cannot truthfully admit or deny the matter.
18 A denial shall fairly meet the substance of the requested
19 admission, and when good faith requires that a party qualify
20 an answer or deny only a part of the matter of which an
21 admission is requested, the party shall specify so much of it
22 as is true and qualify or deny the remainder, and then an
23 answering party may not give lack of information or knowledge
24 as a reason for failure to admit or deny unless the party
25 states that the party has made a reasonable inquiry and that

1 the information known or readily obtainable by the party is
2 insufficient to enable the party to admit or deny, closing
3 the quote there.

4 Now, as to the precedent for the amount of
5 investigation, Mr. Purcell exaggerates this into saying we
6 are purporting to require him to beat the bushes. Well,
7 typing a URL into the internet is hardly beating the bushes,
8 your Honor. It's something you do very quickly in your own
9 office, and in the rules themselves under the commentary
10 under the 1970 amendment, and this is the commentary of the
11 people who are revising the rules, it talks about there
12 being, before this amendment, a sharp split of authority on
13 the question of whether the party can base his answer on lack
14 of information without seeking additional information. One
15 line of cases says he doesn't have to. The majority, larger
16 group of cases supported by commentators has taken the view,
17 if responding party lacks knowledge he must inform himself in
18 reasonable fashion, and then it says the rule as revised,
19 1970, adopts the majority view as in keeping with the basic
20 principle of the discovery rules that a reasonable burden may
21 be imposed on the parties when its discharge will facilitate
22 preparation for trial and ease of the trial process.

23 Well, that just applies absolutely here. He
24 should have said, well, I don't know if it's a corporation
25 but the rest of it is true if that's what he really meant.

1 With that, your Honor, I'd like to call my
2 first witness. I'd like I guess as a procedural issue to ask
3 about admission of exhibits. My understanding is that
4 Mr. Purcell has no objection to our exhibits except perhaps
5 to the deposition transcript because he didn't get the
6 specific pages until this morning. I'm willing to forgo that
7 and use the deposition transcripts just in impeachment if
8 necessary and I'd like, just to speed things along, we're
9 happy to have admitted his exhibits and it would be easier I
10 think for everyone if our exhibits were deemed admitted so we
11 don't have to do it piecemeal through the testimony.

12 THE COURT: I would agree with that. Which
13 deposition transcripts are you referring to?

14 MR. LANDSMAN: They're the depositions of --
15 there are two depositions of Spero Haritatos, one on
16 February 2005, and then another at May 17th, 2006, and those
17 are Exhibits 18 and 19. Then there's some excerpts from
18 Sharon Haritatos' deposition which is Exhibit 20, and then
19 some excerpts from Anna Bushnell on Exhibit 21.

20 THE COURT: 18, 19, 20, 21.

21 MR. LANDSMAN: Yes, your Honor.

22 THE COURT: They're in your folder?

23 MR. LANDSMAN: Yes, your Honor.

24 THE COURT: All right. Any objections, all
25 exhibits on both sides?

1 MR. PURCELL: Your Honor, I have no objection
2 again except for the deposition transcript excerpts set forth
3 in my adversary's exhibit list.

4 THE COURT: Okay, so you have no objection
5 except for Exhibits 18, 19, 20, and 21?

6 MR. PURCELL: Correct.

7 THE COURT: Is that right? Okay. All of
8 Hasbro's exhibits except 18, 19, 20, and 21 are admitted.
9 And your exhibits, no objection to those, Mr. Landsman,
10 plaintiff's exhibits?

11 MR. LANDSMAN: None, your Honor.

12 THE COURT: And the objections to 18, 19, 20,
13 and 21 are objections to the excerpts, did you want to submit
14 additional portions of those depositions?

15 MR. PURCELL: Are you asking me, your Honor?

16 THE COURT: Yes.

17 MR. PURCELL: First of all, those were
18 proffered by my adversary and I don't intend to offer any
19 other portions of the deposition transcripts.

20 THE COURT: So what would be the objection to
21 the excerpts then, Mr. Purcell?

22 MR. PURCELL: The exhibit list was supposed to
23 specify the documents, and again, when referring to these
24 excerpts, I didn't get any pages at all, page numbers and so
25 forth. Mr. Haritatos' deposition transcript, there are two

1 of them, are over 500 pages in total length, for example.
2 And my adversary just said, oh, we want to rely upon some
3 excerpts. Well, I don't think that's enough specificity to
4 say what am I supposed to be prepared for at this hearing on
5 March 4th in reviewing whatever exhibit he plans to use so I
6 may rebut it, impeach it, counter it, and so forth, your
7 Honor.

8 THE COURT: All right. So assuming that's
9 your argument, you now have the excerpts contained in these
10 four exhibits, 18 through 21.

11 MR. PURCELL: Yes.

12 THE COURT: Do you want to look at those and
13 make more specific objections or submit other portions of the
14 transcript, what's your basic objection to the excerpts?

15 MR. PURCELL: Well, your Honor, I just got
16 this exhibit book from my adversary at about 20 minutes of 10
17 this morning, I haven't even looked at the --

18 THE COURT: Haven't seen them, okay. I will
19 give you a reasonable amount of time to at least specify what
20 your objections are to the excerpts, perhaps we can do that
21 at the end of the day so that issue will be resolved. All
22 right. I'll reserve decision on admission of Exhibits 18
23 through 21. All right. Go ahead, Mr. Landsman.

24 MR. LANDSMAN: Thank you, your Honor. We call
25 Mr. Purcell.

1 MR. PURCELL: Your Honor, before we call me or
2 any other person as a witness, your Honor's order of
3 January 31st required each attorney submitting witness and
4 exhibit list specifying very briefly the testimony of any
5 witness and the nature of any exhibit referred to the very
6 language of specifying very briefly the testimony of any
7 witness. What Mr. Landsman set forth for my testimony in the
8 witness list was efforts if any made by Mr. Purcell to
9 respond to defendant's discovery requests and to comply with
10 the court's motions to compel discovery which is necessary to
11 determine where the fault should lie.

12 I submit, Judge, that this is at best just a
13 general broad topic of testimony and does not comply with the
14 court's order about specifying very briefly the testimony,
15 not the topic of the testimony, but the testimony of the
16 witness.

17 MR. LANDSMAN: Your Honor, I'm not sure how I
18 could say what an adversary counsel is going to say on the
19 stand.

20 THE COURT: I agree. Objection overruled.

21 MR. LANDSMAN: I think it would be helpful if
22 the witness had in front of him both binders of exhibits. Do
23 you want me to bring that to you?

24 MR. HUGHES: Your Honor, point of order,
25 should I interpose any objections that we might have or

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1 should we request that the witness himself interpose
2 objections?

3 THE COURT: Whatever your preference is, you
4 can do that on his behalf.

5 MR. HUGHES: With the court's permission then
6 I will make whatever objections I think are appropriate.

7 THE COURT: All right.

8 THE CLERK: Please raise your right hand.

9
10 R O B E R T E . P U R C E L L , called as
11 a witness and being duly sworn, testifies as follows:

12 DIRECT EXAMINATION BY MR. LANDSMAN:

13 Q Mr. Purcell, is it correct that you have
14 represented Mr. Haritatos continuously in this case since its
15 inception?

16 A Yes.

17 Q Just before we get into the specific discovery
18 here, you made a point in your opening about discovery that
19 occurred in the trademark trial and appeal board; it's
20 correct, isn't it, that there was a protective order issued
21 in that proceeding?

22 A I think there was.

23 Q And that protective order precluded the
24 parties from using any discovery in that proceeding for
25 anything else other than that one proceeding?

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1 A I don't recall that, maybe so but I don't
2 know.

3 Q You don't deny it?

4 MR. HUGHES: Objection, asked and answered,
5 your Honor.

6 THE COURT: Sustained.

7 Q Okay. Let me ask you to look at Exhibit 3 of
8 our -- and just for convenience, I know both sides used
9 numbers. I can either say Hasbro Exhibit 3 each time or we
10 can just assume that they're ours unless I say otherwise.

11 THE COURT: Whatever way works, makes it
12 quicker.

13 Q Then if I use a number, it's ours, unless I
14 specifically say plaintiff's. So that's our first set of
15 requests for documents and things in this case, right?

16 A I believe so.

17 Q And you received that and responded to it on
18 December 9th, 2005 and that's what we've marked as Exhibit 4,
19 correct?

20 A That appears to be so.

21 Q Okay. And then you also amended that response
22 later in September 2006 and that's Exhibit 5, right?

23 A It appears to be so.

24 Q Okay. Let me ask you to look at our request
25 on Page -- let me ask you, look at your responses which is

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1 Exhibit 4 to our first request which is on Page 4, and this
2 request is for samples of products or services sold under
3 plaintiff's Candyland mark, right?

4 A On Page 4 of Exhibit 4, I'm looking at that,
5 yes.

6 Q Yeah, okay. Would you agree with me that
7 your -- the first paragraph of your response is what is
8 referred to as boilerplate objections?

9 A Generally speaking, yes.

10 Q And isn't it a fact that you made those same
11 boilerplate objections to every single request that we made?

12 A The boilerplate does vary, I think, from
13 response to response, but overall it's very similar.

14 Q Can you point me to any specific variance in
15 the boilerplate?

16 (Witness reviewing document.)

17 THE COURT: While we're waiting, Mr. Landsman,
18 this protective order you referred to, is that an exhibit
19 anywhere or can you get a copy of that to me?

20 MR. LANDSMAN: I can get a copy of that to you
21 this week, your Honor, I'm sorry it's not in our list.

22 THE COURT: Okay, all right. I'll just jot
23 that down.

24 A It appears from a quick review of it they are
25 the same throughout the response.

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1 Q And is it also correct that in your amended
2 response served September 18th, 2006, you also repeated the
3 same boilerplate objections to every request?

4 A That appears to be true also from a quick
5 review of that document.

6 Q I don't want to go through all of this, but
7 let me ask you this question. Did you have any good faith
8 belief that a request for two samples of any actual or
9 intended products and services by plaintiff in the United
10 States that bear plaintiff's Candyland mark was vague,
11 ambiguous, and unintelligible?

12 A Yeah.

13 Q What is vague about that request?

14 A All right. Two samples of any intended
15 products. What if you have a concept you intend to have some
16 product that doesn't even exist so having a sample of an
17 intended product doesn't make much sense, right? It either
18 exists or it doesn't or you have a concept of what you might
19 want to do but you don't necessarily have one.

20 Next, the real bugaboo here is services, a
21 sample of a service. Mr. Landsman, as a rhetorical question,
22 how do you provide two samples of a service? Service, as you
23 know as a trademark attorney, is intangible by definition.
24 You can't provide samples of services, they're intangible.

25 Now, services by plaintiff in the United

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1 States that bear plaintiff's Candyland mark, that bear it.
2 The product bears it, not the packaging of the product but
3 the product itself bears it, it's printed on the product, you
4 know the difference as a trademark attorney, printing a mark
5 on a product versus printing a mark on a packaging product or
6 advertising of that product, you're saying that bear the
7 mark. The product, candy, that bears the mark, all right.
8 What do you really mean by bears? It's even more nebulous
9 when you talk about a service that bears a mark. Services
10 are intangible, that's standard trademark law, you know that,
11 and this was a goofy request, all right. So it's
12 unintelligible to me as a trademark attorney and it's
13 unintelligible to you when you study it, anybody would.

14 THE COURT: What about the word actual? It
15 says two samples of any actual or intended product.

16 THE WITNESS: All right. Your Honor,
17 sometimes there's actual products, we have for example, my
18 client does, Easter-themed candies, they only come out at
19 Easter time, all right. You're saying, well, I want a sample
20 of your actual product, are we supposed to make up a product
21 for them that we don't have at the moment? Are we supposed
22 to just wait around till Easter comes and say, okay, we got
23 these Easter products, now we'll give you some? Go
24 backwards, well, we did these Easter products, let's go back
25 and give them samples of that product too, regardless of

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1 whether they bear the mark, which they don't.

2 Q Are you finished?

3 THE WITNESS: I'm asking your Honor if you
4 have any further questions or elaboration.

5 THE COURT: Go ahead.

6 Q It didn't occur to you to simply say, we'll
7 produce to you what we have and we won't produce to you what
8 we don't have because that's how we do it?

9 A Produce what we do have, what do you mean?
10 What, Mr. Landsman? I don't understand.

11 Q Request is, did you understand the request to
12 ask you to make up documents?

13 A This sample isn't a document, is it? A sample
14 is a three-dimensional product itself, isn't it? Maybe I'm
15 getting confused, maybe you meant something different by your
16 request than I'm thinking you meant by your request which
17 just interjects further confusion. You talking about
18 documents or are you talking about a sample?

19 Q I asked you a question, Mr. Purcell, can you
20 answer it?

21 A No, I can't.

22 Q Okay, we'll move on then. Let me ask you to
23 look at Exhibit 22.

24 A Exhibit 22?

25 Q Yes.

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1 A Okay.

2 Q The bottom of Page 1 to the top of Page 2.

3 THE COURT: I'm sorry, what was the page
4 reference?

5 MR. LANDSMAN: Bottom of Page 1 to the top of
6 Page 2, your Honor.

7 THE COURT: Of the?

8 MR. LANDSMAN: Of Exhibit 22.

9 THE COURT: Go ahead.

10 Q You see there that we asked you to withdraw
11 your boilerplate objections or provide an explanation of why
12 they applied?

13 A Yeah, you asked me to revise each and every
14 one of my interrogatory responses to --

15 Q We asked you to withdraw the boilerplate
16 objections or explain why they applied, right?

17 A Or explain why, yes.

18 Q And in your response on Exhibit 23 at the
19 bottom of Page 1 you refused, correct?

20 A I'm sorry, where is that?

21 Q Exhibit 23, bottom of Page 1 of your May 2nd,
22 2006 letter.

23 A Yes.

24 Q Okay. Now, one of your objections was to
25 producing samples of products because they might melt,

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1 correct?

2 A Are we looking at Exhibit 23?

3 Q No, we're looking at request number 1 and your
4 response which is Exhibit 4. Page 5, middle of the page, you
5 objected to providing any samples of any actual, you said
6 actual intended products, I don't know what that means,
7 "specially because many of the product," and this is all sic,
8 "apt to melt." Is that right?

9 A Yep, that's one of the reasons, yes.

10 Q And this was in spring, right?

11 A Let me see. This is actually dated in
12 December.

13 Q Sorry, December. And you didn't have any good
14 faith belief that the products were apt to melt in December,
15 did you?

16 A During shipping?

17 Q Yes.

18 A Yeah.

19 Q You felt they could melt?

20 A Sure.

21 Q But you're aware, aren't you, that
22 Mr. Haritatos shipped products during that time period?

23 A Yeah.

24 Q So that your client wasn't afraid of them
25 melting but you were?

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1 A I was, yes, not afraid of them, I wouldn't say
2 afraid of melting.

3 THE COURT: Sorry, what was that last part?

4 THE WITNESS: I wasn't afraid of them melting.

5 THE COURT: You were concerned?

6 THE WITNESS: One of the concerns, yes.

7 Q Even though your client was not?

8 A I don't know about my clients.

9 Q Well, you know that your client ships products
10 during that time period, right?

11 A Yes.

12 Q Okay. Now if you go back to our letter which
13 is April 17th, 2006 which is Exhibit 22, we also pointed out
14 at the top of Page 2 under the paragraph that begins,
15 "Third," that in several instances you had asserted that you
16 had already produced responsive documents in the TTAB
17 proceeding when in fact you had refused to produce the
18 requested documents in the TTAB proceeding, do you see that?

19 A I see the language on Exhibit 22, yes.

20 Q And let's look at your response to that which
21 is the May 2nd, 2006 letter which is Exhibit 23 and if I can
22 help you find it, it's basically the first full paragraph of
23 Page 2. You see that?

24 A Yes.

25 Q And you didn't quarrel with the fact that you

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1 had previously said that documents had been produced that
2 hadn't in fact been produced, right?

3 A Well, obviously there were many documents
4 produced in connection with the TTAB proceeding and probably
5 raised objections to producing other requested documents and
6 things in the TTAB proceeding.

7 Q So you made an objection that the documents
8 had been produced previously in a TTAB proceeding without
9 really knowing whether they had or had not, correct?

10 A At the time that I wrote this letter on,
11 for -- on May 2nd, 2006, I don't recall.

12 Q And you don't recall whether you knew when you
13 signed the responses to the objections whether you had in
14 fact checked to see whether any of these documents had been
15 produced or not, right?

16 A No, that's not true because I think that the
17 interrogatories and document requests at least initially in
18 this lawsuit were very much overlapping and very, very
19 similar to those in the Trademark Office proceeding, and I
20 probably had used as a boilerplate or template I should say
21 for responding to many of the interrogatories and document
22 requests in this lawsuit very responses that I made in the
23 Trademark Office proceeding to essentially the same types of
24 interrogatories and document requests that Hasbro served in
25 the Trademark Office proceeding.

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1 Q Isn't it a fact, Mr. Purcell, that you
2 objected to producing certain documents because you claimed
3 that they had been produced already in the TTAB proceeding
4 when in fact you did not know as to certain of those
5 documents whether they had or had not in fact been produced
6 before?

7 A I don't believe that's true, but as of
8 May 2nd, 2006, I don't recall what my state of mind was at
9 that point in time but just my practice as an attorney, I
10 would not have made that statement without a good faith basis
11 for making it.

12 Q And in your May 2nd, 2006 response you said, I
13 don't know whether I produced them before or not but if I
14 didn't produce them before, I'm not producing them now,
15 right?

16 A Where do you see that?

17 Q In that paragraph.

18 A I'm sorry, which sentence are we referring to?

19 Q I'll read the paragraph to you. "You also
20 asked me to reconsider some responses to the effect that
21 responsive documents have already been produced in connection
22 with the TTAB proceeding. You have maintained that since I
23 objected to producing some of the documents requested in
24 Hasbro's request for documents in the TTAB proceeding, that I
25 have not produced all of the requested documents. Regardless

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1 of the nature of the document requests, the objections, and
2 the documents produced by Mr. Haritatos in connection with
3 the TTAB proceeding, with regard to the request in the
4 instant federal court lawsuit, Mr. Haritatos has set forth
5 his objections, and to the extent that he does not object to
6 the request, he has already produced the documents to Hasbro
7 and therefore believes that he need not reproduce those
8 documents."

9 Now I'm not sure I understand that, but I was
10 trying to sort of summarize it as, are you saying that even
11 if you didn't produce in the TTAB proceeding documents that
12 you said had been produced in the TTAB proceeding, you still
13 weren't, just weren't going to produce them, is that an
14 accurate summary?

15 A No, I don't think so.

16 Q Okay. Well, somebody else can try to parse
17 that language then.

18 MR. HUGHES: Objection, move to strike
19 counsel's comments.

20 THE COURT: Overruled, there's no jury here.

21 Q Okay. Now, we responded to your letter both
22 on -- in Exhibit 24 and Exhibit 25, right?

23 A Hasbro's attorney's letter May 9th, 2006,
24 Exhibit 24 appears to respond to my May 2nd, 2006 letter,
25 Exhibit 23.

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1 Q And in both of those letters --

2 A Well, I'm not -- I don't know about
3 Exhibit 25, whether that's responding to my May 2nd, 2006
4 letter.

5 Q Well, isn't it correct that in both of those
6 letters, we've reiterated our request or demand, however you
7 want to characterize it, that you produce documents in
8 response to certain specified document requests?

9 A I don't know.

10 Q Well, take a look at them.

11 A Thank you.

12 MR. HUGHES: Your Honor, I'm going to object.
13 I think the documents are in evidence, the documents speak
14 for themselves. I think we're spending an awful lot of time
15 trying to restate what the documents themselves state and I
16 think that's for the court to read the documents in evidence
17 and form its own conclusions.

18 THE COURT: We do, but it will substantially
19 simplify things if a couple of simple questions were answered
20 so I'm going to allow the question. The question was whether
21 you requested, again requested these documents, correct?

22 MR. LANDSMAN: Yes, your Honor.

23 THE COURT: In two letters, the one of
24 May 9th, 2006, Exhibit 24, and a letter of June 8th, 2006,
25 Exhibit 25.

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1 MR. LANDSMAN: Yes, your Honor.

2 THE COURT: Mr. Purcell, your answer is?

3 A I'm having -- I'm trying to do my best, your
4 Honor, and frankly my brain is a bit fried at the moment.
5 I'm trying to figure out whether Mr. Landsman's question or
6 your question says is the June 8th, 2006 letter responsive to
7 my May 2nd letter or is it responsive to the same discovery
8 issues addressed in my May 2nd, 2006 letter and if it's
9 responding to my May 2nd, 2006 letter. I'm still looking
10 through the June 8th, 2006 letter to see if there's a
11 reference to the May 2nd, 2006 letter or something within the
12 May 2nd, 2006 letter, and I'm sorry, I need some time, I
13 haven't looked at this stuff. I just got these exhibits 20
14 minutes before the hearing today.

15 Q Let me try to simplify it. In these May 9th
16 and June 8th letters, we're continuing our attempt to get you
17 to produce the documents that we had requested in our first
18 set of requests for production in which you had refused,
19 right?

20 A It's not totally true. I'm looking at the
21 middle of the second page of the June 8th, 2006 letter,
22 Exhibit 25, says, "Plaintiff's document production remains
23 woefully deficient, notwithstanding the 33 pages of documents
24 that Haritatos produced on June 1st, 2006." So apparently
25 between May 2nd, 2006 and June 8th, 2006, the plaintiff

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1 produced some documents.

2 Q Let me try to short circuit it a different
3 way. Do you still contend that we did not attempt to meet
4 and confer with you before bringing our motion to compel and
5 before bringing this motion?

6 A Yes.

7 Q Okay. Let me ask you to look at the last
8 sentence of my June 8th, 2006 letter which is Exhibit 25,
9 just ask you to confirm it says, "Please let me know when is
10 the earliest time you can discuss these issues by phone.
11 Thank you for your cooperation." You see that?

12 A Yes.

13 Q And now let me ask you to look at your e-mail
14 of June 21, 2006, and specifically the last sentence, last
15 two sentences. Would it be accurate to say --

16 THE COURT: Which exhibit is that?

17 MR. LANDSMAN: I'm sorry, it's Exhibit 26,
18 your Honor.

19 THE COURT: Referring to which part of that?

20 Q The last two sentences, your Honor. And
21 you -- would it be accurate to summarize your response there
22 as saying, well, you're now just too late after all these
23 attempts to meet and confer and you can't move to compel so
24 I'm not going to discuss it anymore?

25 A No.

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1 Q Accurate to say that you contended that
2 because we were 10 days after the discovery cutoff, we
3 couldn't move to compel?

4 MR. HUGHES: Objection, your Honor, again, the
5 document speaks for itself.

6 THE COURT: It does, I'll sustain it. Move
7 on, Mr. Landsman.

8 Q I'll move on. So we then brought a motion to
9 compel, right, and that motion was granted in Judge
10 DiBianco's August 11, 2006 order which overruled your
11 objections and ordered you to produce all outstanding
12 discovery by September 11th, right?

13 A Well, it's a compound question. Hasbro
14 brought a motion to compel some discovery of some sort, Judge
15 DiBianco held a telephonic conference I believe on that
16 motion and many other motions pending before him and he made
17 his August 11th ruling, have to go to the specific terms of
18 that order to tell you what he said or not.

19 Q It's Exhibit 1.

20 A Okay.

21 Q Now there's a part of that order that you
22 didn't read when you were reading it to the court before
23 right at Page 9, second to the last Ordered, it said,
24 "Plaintiff's letter motion dated June 26, 2006 is granted,"
25 you see that?

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1 A Yes.

2 Q Yes, and let me ask you to look at Exhibit 34
3 which is my June 26, 2006 letter to Judge DiBianco. Now
4 there's a typo I think there, it says plaintiff's letter
5 motion dated June 26, I'm pretty sure your Honor meant
6 defendant's letter because that was my letter that got
7 granted. Did you understand that to refer to my June 26,
8 2006 letter?

9 A I did not have any understanding about that
10 upon reading Judge DiBianco's August 11th, 2006 order.

11 Q So I'm sorry, is it your testimony that you
12 didn't know what he was granting?

13 A I thought he did, yes.

14 Q That he granted our motion to compel?

15 A He granted the relief set forth in his
16 August 11th order, he specified what relief he was granting.

17 Q And the relief was our letter motion of
18 June 26th, 2006, right?

19 A That's what I understand from the partial
20 sentence on Page 9 of Judge DiBianco's August 11th order,
21 yes.

22 Q Okay. And if you look at our June 26, 2006
23 letter which is Exhibit 34, if you look at the last two
24 pages, those two pages very explicitly tell the court what
25 relief we're seeking. Right?

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1 A I don't know if it's specifically specific as
2 to what you're seeking, no, I don't.

3 Q I'm sorry, you don't think that the last part
4 of Page 5 and Page 6 were specific enough?

5 A Page 5 and Page 6. Of?

6 Q Of our June 26 letter.

7 A 5 and 6?

8 Q Yes. The bottom of Page 5, top of Page 6.
9 Beginning with, "The obstructionist behavior should not be
10 tolerated. Accordingly, Hasbro requests that the court order
11 Mr. Haritatos to produce all documents concerning," and then
12 there are six paragraphs and then asking that the court order
13 Haritatos to respond to the first set of interrogatories and
14 second set of document requests. Right?

15 A I didn't understand that, no, from Judge
16 DiBianco's August 11th, 2006 order.

17 Q Did you ever ask Judge DiBianco to clarify his
18 order to let you know more specifically what you had to do?

19 A No.

20 Q And I'm sorry, your testimony is that -- I'm
21 trying to figure out, is your testimony that you didn't think
22 that our request was sufficiently specific enough or you
23 didn't think Judge DiBianco's order was sufficiently
24 specific?

25 A I thought Judge DiBianco's order was something

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1 that I had to comply with, all right, my client had to comply
2 with in good faith, which I think we did.

3 Q My question was did you believe that his order
4 was not specific enough?

5 A Was not specific enough for what?

6 Q About what you had to do.

7 A I guess I thought it was specific enough when
8 I looked at the phrase --

9 Q And then --

10 A -- in Judge DiBianco's ruling which said,
11 "Hasbro has requested information -- Hasbro has requested
12 information, including customer lists; the application for
13 their Turkey Joints registration; and information regarding
14 damages. This court finds that this information is relevant
15 and discoverable, given the protective order that has been
16 entered in this case." It seems that that's the specific
17 relief that Judge DiBianco was ordering, be no reason for
18 Judge DiBianco to single out this stuff and make it ambiguous
19 as to what the other stuff was that he was ordering to be
20 produced.

21 Q I'm sorry, where were you reading from?

22 A Top of Page 8.

23 Q So it's your testimony that that's all you
24 thought you were ordered to do?

25 A Yes, by the order.

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1 Q And you understand, don't you, that the order,
2 actual order says, Ordered, that defendant's letter motion is
3 granted, right?

4 A Yes.

5 Q And you saw that in response to the objections
6 you filed with Judge Hurd we were talking about far more than
7 these specific things that were on Page 8, right?

8 A I saw that Hasbro's contention was that Judge
9 DiBianco's order was broader than what I thought it was, yes,
10 I did see that.

11 Q And you never said in your objections, wait a
12 minute, Hasbro is talking about something that Judge DiBianco
13 never ordered?

14 A I don't recall what I might have stated to
15 Judge Hurd in that regard.

16 Q Well, the objections and responses are of
17 record and they will show that there was never such a
18 contention.

19 THE COURT: Let's take a look at this Page 9,
20 there is some confusion in the order. In the middle of the
21 page it says, "Ordered, that plaintiff's letter motion dated
22 June 26, 2006 (Docket 59) is granted." I think the docket
23 sheet does show that 59 was plaintiff's letter motion, says
24 letter motion from Robert E. Purcell for Spero Haritatos, so
25 it's unclear, little unclear to me. You, Mr. Landsman,

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1 contend that your June 26th letter which is Exhibit 30 --

2 MR. LANDSMAN: 35 -- 34, sorry.

3 THE COURT: 34, that that was your letter
4 motion, is that right?

5 MR. LANDSMAN: That's the only letter motion
6 that was June 26th, and you'd already denied plaintiff's
7 letter motion the paragraph before.

8 THE COURT: Right.

9 MR. LANDSMAN: And your Honor, what is Docket
10 Number 58 then?

11 THE COURT: 58 says letter motion from Robert
12 E. Purcell for Spero Haritatos requesting an order of
13 referral to mediation and request for declaratory ruling that
14 plaintiff has not belatedly identified a potential witness so
15 as to preclude plaintiff from utilizing witness' testimony.
16 And you're correct, that was denied. But the docket sheet
17 refers to 59 and I think I followed the docket sheet
18 unfortunately. Well, anyway, just so I understand where
19 you're going. Move on, please.

20 MR. LANDSMAN: Okay.

21 THE COURT: We're going to take a lunch recess
22 in a couple minutes. Do you have more than four, five
23 minutes?

24 MR. LANDSMAN: I could go forward on something
25 slightly new or we could stop now, whichever your Honor

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1 prefers.

2 THE COURT: Let's just take a lunch break,
3 we'll reconvene at 2:00.

4 (Whereupon a recess was taken from 12:45 p.m.
5 to 2:04 p.m.)

6 MR. HUGHES: Your Honor, before we continue
7 with the testimony, I'd like to make a motion if I may.

8 THE COURT: Go ahead.

9 MR. HUGHES: Okay. You recall this morning
10 there was a lot of testimony and questions related to your
11 order, specifically that paragraph which talked about
12 ordering the plaintiff's letter motion dated June 26th,
13 document 59, granted. Do you recall all that? And there was
14 apparently some position taken by Mr. Landsman that may have
15 been a typographical error and he was really, quote,
16 referring to his letter of June 26th which is his Exhibit 34.

17 During the recess we went and obtained what
18 appears to be Docket Number 59 and that appears to be a
19 letter dated June 26th and the court, as expected, is again
20 one step ahead of me, your Honor, but based upon that, I
21 would like to move to strike all questions and all testimony
22 elicited by Mr. Landsman under the pretext that your order
23 referencing Docket Number 59 was in fact his letter which I
24 note by reviewing his exhibits, I don't see a copy of
25 Mr. Purcell's letter in his exhibit book. So I would move to

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1 strike all testimony, all questions, and anything else in his
2 materials which attempt to elicit that that order was
3 referencing his letter versus the letter from Mr. Purcell.

4 THE COURT: Okay. If there were a jury
5 present, I would probably grant that, but there's no jury
6 here, and there is certainly confusion over these June 26th
7 letters. There were two letters apparently filed on
8 June 26th. One of them, as you learned, is Docket Number 59
9 which is Mr. Purcell's letter, and that in fact is the motion
10 that was granted which extended the discovery deadline, but
11 Mr. Landsman's long letter of -- much longer letter of
12 June 26th was also filed and of course with electronic
13 filing, everything is instantaneous, but the order is
14 correct, the order does say plaintiff's letter motion dated
15 June 26th which was Mr. Purcell's motion requesting
16 rescheduling of the discovery deadline, and we did grant
17 that. But I'm not going to strike all that. I understand
18 what the confusion was and of course since there's no jury, I
19 would give everything the weight according to what I need,
20 how I need to review this.

21 Mr. Landsman, you may proceed.

22 MR. LANDSMAN: Thank you, your Honor, and I
23 apologize for the confusion that I introduced into it.

24 Q Mr. Purcell, let's go back to that order and
25 you were before referencing Page 8 of it, that's Exhibit 1 on

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1 our documents. You see the first full paragraph it says, "A
2 review of the discovery requested by defendant Hasbro shows
3 that the information that Hasbro was seeking in its discovery
4 requests is relevant to the issues in this action, and thus,
5 should be produced." And then the last sentence says, "All
6 outstanding discovery relating to the letter motions
7 discussed above, and to the extent that it has not already
8 been produced, must be produced by both parties within 30
9 days of the date of this order." Do you see that?

10 A Yes.

11 Q And is it correct that you did not produce any
12 additional documents by September 11th?

13 A I don't recall.

14 Q You don't recall?

15 A I don't recall.

16 Q Do you deny that nothing was produced by
17 September 11th?

18 MR. HUGHES: Objection, your Honor, asked and
19 answered.

20 THE COURT: Overruled.

21 A Do I deny --

22 Q Yes.

23 A -- that documents -- no, deny it.

24 Q Can you think of any single document you
25 produced between August 11th and September 11th, 2006?

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1 A I can't think of any sitting here, today.

2 Q Is it correct that you did not produce any
3 additional documents by November 30th which is the deadline
4 that Judge Hurd set?

5 A I don't think that's true, I think I responded
6 to some more discovery in that time interval.

7 Q You're correct that you sent some discovery
8 responses September 18th and my question was limited to
9 documents.

10 A Documents other than responses to discovery
11 requests?

12 Q Okay. Is it correct that you did not produce
13 any documents in response to our requests for documents by
14 November 30th?

15 A Again, I don't recall.

16 Q And going back to the prior inquiry, is it
17 your contention that you produced any documents to comply
18 with Judge DiBianco's August 11th order?

19 A At any time?

20 Q At any time up until January 2008 let's say.

21 A We had already produced -- my contention is,
22 yes, we did produce stuff. We had in fact produced for
23 example the stuff relating to the Nora Haritatos trademark
24 application in June of 2006 as reflected in one of my
25 exhibits before the court today --

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1 Q I'm sorry to interrupt, let me then withdraw
2 that question and ask --

3 MR. HUGHES: Your Honor, I'm going to object,
4 counsel's posed a question, the witness has started to
5 respond and now counsel wants to stop.

6 THE COURT: Yeah, he's going to withdraw the
7 question, go ahead.

8 Q Is it correct that you cannot point to any
9 document that you produced between August 11th and
10 January 28th in response to Judge DiBianco's August 11th
11 order?

12 A Yes, we produced the 5,593 pages of documents.

13 Q In January 2008, right?

14 A No.

15 Q That's when you sent them to us, isn't it?

16 A You asked me whether we produced them, we
17 produced them at least as early as December 14th when I put a
18 phone call in to your office which you've transcribed from
19 the voice mail indicating they're ready for your inspection.
20 Production is available for inspection and copying. They
21 were available for inspection, copying at least as early as
22 that date.

23 Q We'll get to that a little bit later but isn't
24 it a fact that you said you hadn't stamped them and therefore
25 they weren't ready to be copied?

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1 A They were ready to be inspected and I think
2 one of my e-mails that you'll see says that anybody reviewing
3 them must abide by the confidentiality provisions in the
4 protective order and whatever it is selected to be copied, we
5 will put the appropriate legend on them at that time, it's in
6 the e-mail exchanges.

7 Q Let's -- let me ask you to look at your
8 exhibits, Exhibit Number 27.

9 A I don't have that.

10 Q I'm sorry, I thought I brought it up to you,
11 did you take it back with you?

12 A These are defendant Hasbro's exhibits.

13 Q I think these are yours.

14 A Exhibit 27?

15 Q Yes. And on Page 2 there's an e-mail from you
16 to me dated December 27th saying the documents had not been
17 Bates stamped or stamped confidential pursuant to the terms
18 of the protective order and then you ask me to suggest how I
19 would like to proceed, right?

20 A Yes.

21 Q And I responded to you, let's proceed the same
22 way we always have, copy them and bill us if you wish, right?

23 A You state, this is what you're referring to as
24 with all prior documentary discovery, please have the
25 documents copied and sent to us, that was your position.

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1 Q Bill us for that if you wish, right?

2 A Yes.

3 Q Okay. And then if you look back to Page 1,
4 your associate Kathryn Daley says that she thinks she can
5 make them available in electronic format, please advise if
6 that's acceptable, you see that?

7 A Page 1 of Exhibit 27?

8 Q Yes.

9 A Yes.

10 Q And I respond the same day, on January 1st,
11 2007, "Electronic format should be fine," right?

12 A Yes.

13 Q And then she responds, "Wonderful. I will
14 start working on the discovery and have it to you as soon as
15 possible, thanks for your prompt reply," right?

16 MR. HUGHES: Your Honor, we would again
17 object. The documents are in evidence, I think we're
18 spending a lot of time rereading some of these things we
19 already read once this morning. Documents are in evidence,
20 they speak for themselves, I think we're just wasting time.

21 THE COURT: Well, they do, Mr. Hughes. The
22 only problem is that there are hundreds of pages of these
23 documents and it's easier for me if we focus on the documents
24 with questions rather than my reading 4, 500 pages and
25 absorbing those and looking for the relevant matters, so I'm

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1 going to allow Mr. Landsman to continue. Overruled.

2 Q Let me just pin down one thing here, and let's
3 assume that your voice mail of December 14th constitutes
4 production. Is it correct that the first time you produced
5 documents in response to either Judge DiBianco's August 11th
6 order or Judge Hurd's October order was December 14th; that's
7 the earliest possible date?

8 A No. As I mentioned to you before, some of
9 those documents had been previously produced in June of 2006,
10 before you asked, before you told Judge DiBianco that we
11 hadn't produced those things which was inaccurate, and got
12 him to order us to produce things that we'd already produced.
13 That is Nora Haritatos' application --

14 Q Is it correct, Mr. Purcell, that the first
15 time you produced a document after the August 11th order was
16 at best, at earliest, December 14th, 2007?

17 A I don't recall.

18 Q Okay. Let me ask you to look at Exhibits 6
19 and 7 of our exhibits. These are our first set of
20 interrogatories and your responses. Now we served these
21 responses on May 31st, 2006, right?

22 THE COURT: This is Exhibit 6?

23 MR. LANDSMAN: Yes, your Honor.

24 A Served these interrogatories?

25 Q Yes.

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1 A Exhibit 6, it appears they were served
2 May 31st, 2006.

3 Q Okay. And you did not respond until
4 September 28th, 2006, three-and-a-half months after they were
5 served, right?

6 A It appears so. It also, I think these were
7 the ones that I was saying were belatedly served and didn't
8 need responses and Judge DiBianco might have ordered to be
9 responded to.

10 Q I'm sorry, so is it your testimony that you
11 finally responded because Judge DiBianco ordered you to or
12 was there some other reason?

13 A Well, I'm guessing a little bit, I think that
14 if, there were -- there was discovery served May 31st, 2006,
15 it's my recollection that was beyond the discovery cutoff
16 date at that time, was my recollection sitting here today,
17 and that if that's true, then that discovery I objected to as
18 being belated and needing of no response, because Judge
19 DiBianco extended discovery cutoff date, that argument was
20 moot and therefore a response to that discovery was needed.
21 I believe sitting here today that Exhibit 7 is a response to
22 that discovery Exhibit 6 based upon Judge DiBianco's
23 extension of the discovery cutoff date.

24 Q Judge DiBianco also explicitly ordered you to
25 respond by September 11th, didn't he?

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1 MR. HUGHES: Your Honor, I'm going to object
2 again because the order itself, it's your order, we've
3 already had discussions about the paragraphs in which you
4 made certain rulings with respect to the letter motions by
5 counsel for Hasbro, and counsel is now leaping to the
6 conclusion that despite what we now clarify, that you did not
7 grant the application contained in his letter of June 26th
8 but in fact granted the application of Mr. Purcell, the order
9 that your court entered in decision on Page 8 is pretty clear
10 as to what your direction to counsel to produce. So by
11 counsel saying that he didn't comply with the court's order,
12 I think that needs a little bit more clarification as to what
13 specific provisions of the order, I object to that line of
14 inquiry.

15 THE COURT: I'm going to direct that you
16 clarify that inquiry, Mr. Landsman. Are you referring to the
17 ordering paragraphs or just Page 8 of the order?

18 MR. LANDSMAN: Well, your Honor, I think that
19 Mr. Hughes is compounding my unfortunate confusion with even
20 more confusion of his own here because your order starts on
21 Page 7, starts out talking about our request and our letter
22 brief of June 26th and says, "Plaintiff's position is
23 unreasonable and this problem will be solved by this court's
24 order extending discovery deadlines. To the extent that
25 plaintiff's objection to production of this information is

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1 that it has been requested too late, then plaintiff should
2 produce the requested information immediately since the
3 deadlines will now be extended."

4 So there's no doubt that the court ordered him
5 to respond to those requests and it goes on to say that, "A
6 review of the discovery requested shows that the information
7 is relevant and must be produced," and then the last
8 paragraph says, "All outstanding discovery to the extent not
9 already produced must be produced within 30 days of the date
10 of this order."

11 Now I will admit that I introduced some
12 unfortunate confusion about the paragraph before that but
13 there's no confusion about ordering that the interrogatories
14 be responded to and the second set of discovery -- of
15 document requests be responded to. If Mr. Purcell wants to
16 deny that and say that he didn't understand your order that
17 way, I'm happy to -- you know, he can say that.

18 MR. HUGHES: Your Honor, counsel overlooked
19 the -- when he quoted the first line on Page 8 of the first
20 paragraph, he overlooked the very clear itemization by this
21 court as to what it requested and what should be produced.

22 MR. LANDSMAN: That's not -- it says
23 including, including is a very example.

24 THE COURT: I don't think there's going to be
25 much confusion in my mind about my order, so let's move on.

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1 MR. LANDSMAN: I can't remember what the
2 question pending was.

3 THE REPORTER: "Question, Judge DiBianco also
4 explicitly ordered you to respond by September 11th, didn't
5 he?"

6 A I think there's two aspects of the judge's
7 order on that discovery. First of all on Page 7 of the
8 August 11th order, Hasbro's Exhibit 1, he talks about the
9 May 31st, discovery served by Hasbro May 31st, explained it
10 and then plaintiff refused to respond to the request, newer
11 requests, Judge DiBianco says plaintiff's position is
12 unreasonable, problem will be solved by this court's order
13 extending discovery deadlines. To the extent plaintiff's
14 objection to this information is that it has been requested
15 late, then the plaintiff should produce the requested
16 information immediately since the deadlines will now be
17 extended. It says to the extent plaintiff's objection to
18 this information was that it was requested, doesn't say I
19 can't make any other objections, it just says to that extent,
20 you know, produce the requested information immediately. I
21 would have liked to have responded quicker than
22 September 18th, naturally, but I don't think I was dilatory
23 in getting the responses by September 18th.

24 Q I don't think that was a responsive answer.

25 A Continuing on, another part of the order said,

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1 all outstanding discovery relating to the letter motions.
2 And to the extent it has not already been produced,
3 presumably means production of documents rather than
4 interrogatory responses, must be produced by both parties
5 within 30 days of the date of this order.

6 THE COURT: All right.

7 Q Now let me ask you to look at your responses
8 to interrogatories 1a, 1b, 1c, 1d, 1e, 1f, 1g, and 2, and ask
9 you to confirm that all of those responses begin with a
10 paragraph of an extensive litany of boilerplate objections.

11 A Well --

12 THE COURT: This is Exhibit 4?

13 MR. LANDSMAN: I'm sorry, Exhibit 7, your
14 Honor.

15 THE COURT: 7.

16 A I will say that they appear to include the
17 standard boilerplate objections but I will contest there's
18 extensive litany, whatever you characterize them as being.

19 Q Is there any boilerplate objection you believe
20 you left out?

21 A I'm not sure what you mean by is there any
22 boilerplate objection that I left out, in this boilerplate
23 objections?

24 Q Yes.

25 A There could be numbers of other boilerplate

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1 objections beyond those that I posed here, codefense
2 privilege and so forth, bunch of other stuff, obviously that
3 doesn't -- didn't apply in this particular lawsuit.

4 Q Okay. You're familiar with Federal Rule of
5 Civil Procedure 33(d), correct?

6 A Probably at one or more times in my career
7 been very familiar with them, but right now I'm not familiar
8 with it.

9 Q Now, is it correct that your responses to
10 Exhibits 1a, 1b -- I'm sorry, interrogatories 1a, 1b, 1c, 1d,
11 1e, 1f, 1g, and 2 all refers to two depositions without
12 giving any specifics as to pages or lines?

13 A Which ones are supposed to be relating to
14 certain deposition exhibits?

15 Q 1a.

16 A Testimony --

17 Q 1a.

18 A Yep.

19 THE COURT: Give me the page numbers.

20 Q 1b.

21 THE COURT: 5, Page 5?

22 THE WITNESS: Yes.

23 Q 1b, which is in Page 7?

24 A 1c, 1d.

25 Q Yeah.

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1 A 1e.

2 Q 1f, 1g, and 2.

3 A 1g, and 2. Yes, you were asking the same
4 sorts of things, two witnesses, Mrs. Spero Haritatos --

5 Q Is there anything in Rule 33 that allows you
6 to answer an interrogatory by reference to deposition
7 transcripts that you're aware of?

8 A Not specifically, no.

9 Q Now let me ask you to look at our Exhibit 27
10 which is a letter from our office to you.

11 A Actually can I modify that a bit, your Honor.
12 I think you're entitled to basically refer them in good faith
13 to deposition transcript testimony, where they already have
14 transcript of the deposition, where the burden of basically
15 finding that deposition testimony is at least as easy on the
16 requesting party as it is on the responding party. I think
17 that it's unduly burdensome to require the responding party
18 to go through the transcript that the other side already has
19 and they've already asked the questions to go through it and
20 pinpoint, well, it's here and it's there and these other
21 places in the transcript, it's just an exercise in an onerous
22 burden of putting more work on responding party. It's simply
23 duplicative.

24 THE COURT: I think the rule says what it
25 says, Mr. Purcell, and your views about whether the rule

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1 makes sense or not are not that important. Go ahead,
2 Mr. Landsman.

3 Q Your references were not to the depositions of
4 any party, they were in the depositions of Sharon and Olga
5 Haritatos, right? You can look back at them if you'd like
6 to.

7 A Yeah, they're not technically parties to the
8 lawsuits.

9 Q And an interrogatory is addressed to a party,
10 correct?

11 A Yes.

12 Q You understood that?

13 A Yes.

14 Q Now let me ask you to look at our October 6,
15 2006 letter where we take issue with various of your
16 responses, including the inappropriate boilerplate
17 objections. Do you recall any response to that letter?

18 A I don't recall any response.

19 Q We don't have any in our file, that's why I
20 asked. Now did I hear you correctly in your opening say that
21 we hadn't until recently pointed out to you that Judge
22 DiBianco's order had to be obeyed, notwithstanding objections
23 to Judge Hurd?

24 A Can you please repeat that.

25 Q Can you read it back, please.

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1 (Whereupon the question was read.)

2 A I think I said in my opening that when
3 September 11th came and went, I didn't receive any
4 communication from you saying, hey, where is the stuff, you
5 can't -- you need to disclose the stuff regardless of what
6 Judge Hurd may do on appeal, regardless of whether he
7 reverses Judge DiBianco or not, you have to comply with
8 Judge DiBianco's order. I think that was what I said in
9 my --

10 Q Okay. Let me ask you to look at, start with
11 Page 2 of the October 6, 2006 letter. The middle of the page
12 under the heading, plaintiff's first amended and supplemental
13 response to Hasbro's first set of requests for production of
14 documents and things. Do you see in the third sentence we
15 said, "Although Haritatos has appealed the order, that does
16 not stay it and the appeal to Judge Hurd does not justify
17 disobedience of a court order. Any withholding of documents
18 that the court has ordered to be produced is a contempt of
19 that order," you see that?

20 A Yes.

21 Q Do you regard that as being inconsistent with
22 what you said in your opening?

23 A No, because October 6 is what, about
24 three-and-a-half weeks after September 11th.

25 Q So again we didn't jump quickly enough for

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1 you?

2 A Do you really want me to try to answer that
3 question?

4 Q Yeah, I do want you to answer that question.

5 A I do not -- answer it, what you mean by jump
6 quickly enough for you, know what it means, please clarify.

7 Q You don't understand the question, you don't
8 have to answer it.

9 MR. HUGHES: Objection, your Honor, it's an
10 argumentative question.

11 THE COURT: Sustained.

12 Q All right. Page 3, note on the second full
13 paragraph, we again remind you that you have to comply with
14 the August 11th order?

15 A Where is that, I'm sorry?

16 Q Page 3 of the October 6th letter.

17 A Yes, I see that too.

18 Q And is it your contention that that again,
19 that was not soon enough to remind you of your obligation?

20 A It's not -- first of all I did not consider it
21 to be an obligation, I took a different position from you. I
22 do not see any case law supported for your proposition, it's
23 just another one of millions of Hasbro's positions on various
24 issues, contentious issues in this lawsuit. And yes, you've
25 set forth Hasbro's position as though you were judge and

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1 Supreme Court justice deciding what the law was many times,
2 Mr. Landsman, and just because you say it's what I'm supposed
3 to do, doesn't necessarily mean it's so. Maybe it is, maybe
4 it isn't.

5 Q Did you do any legal research and did you find
6 the cases that we cited to the court in our opening?

7 A Did I do any legal research?

8 Q Yes.

9 A I've done legal research on appeals of
10 Rule 72, have not seen any decisions in my legal research
11 regarding the issue of whether the magistrate's ruling is not
12 stayed pending appeal and would seem to reason that it would
13 eviscerate Rule 72 and the right to appeal if you had to
14 abide by the magistrate's decision, unlike appeals from
15 District Court to a court of appeals.

16 Q That does not eviscerate the District Court's
17 order, that you have to move to stay before you can disobey
18 it.

19 A There's a strong body of case law on that
20 point about staying execution of the District Court's
21 judgment and final orders in a pending appeal, that's --
22 there's a huge body of law on that.

23 Q Let me ask you to look at your response to our
24 second set of requests for documents which is Exhibit 9.
25 That again was, as with the interrogatories, was served

1 September 18th, 2006.

2 A It appears so.

3 Q Let me ask you to point out one thing here.
4 Your response to request number 7 about legal fees and costs
5 in connection with a civil action, couple of questions here.
6 One is I understand you to have said in your declaration
7 before that you're on contingency so my question is were
8 there any documents concerning legal fees and costs paid in
9 connection with this civil action that were being claimed?

10 A I -- please break up that question.

11 Q Okay. As of September 18th, 2006, did
12 plaintiff to your knowledge have in its possession documents
13 concerning legal fees paid by him in connection with this
14 civil action?

15 A Yes.

16 Q Notwithstanding the fact that you were on
17 contingency?

18 A I don't know what you mean by notwithstanding
19 the fact that I was on contingency.

20 Q Well, I'm sorry, my understanding of
21 contingency, correct me if you have a different one, is that
22 the plaintiff doesn't pay you along the way, that you get a
23 percentage of the plaintiff's recovery.

24 A That's not totally true.

25 Q So was the plaintiff paying you along the way?

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1 A Was he paying me, meaning my law firm, for
2 work done in connection with this lawsuit?

3 Q Yeah.

4 A Yes.

5 Q He was paying you an hourly rate for work?

6 A No. No.

7 Q What was he paying you?

8 A For disbursements.

9 Q Was he paying legal fees?

10 A Well, if you encompass legal fees to mean
11 costs and so forth, yes.

12 Q Okay. Now you in the last paragraph object to
13 request number 7, after objecting to it as being vague,
14 ambiguous, and unin -- overbroad and duplicative for the
15 second time, then especially object to the vagueness of the
16 word concerning. Now you're admitted to the Southern
17 District of New York, aren't you?

18 A Yes, I was a long time ago.

19 Q So you're required to be aware of its local
20 rules, right?

21 A I don't know.

22 Q Yes?

23 A I don't know.

24 Q Are you aware of the local rules?

25 THE COURT: Are you talking about Southern?

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1 Q The Southern and Eastern District of New York.

2 A No.

3 Q Okay. Are you aware that -- let me put in
4 front of you a copy of Local Rule 26.3 and I can hand it up
5 to the court.

6 THE COURT: Of which, Southern?

7 MR. LANDSMAN: Southern and Eastern District
8 of New York.

9 MR. HUGHES: Those rules don't apply in this
10 court.

11 MR. LANDSMAN: I'm not claiming that they do,
12 your Honor, it's for a different point.

13 MR. HUGHES: Still going to object, your
14 Honor, I don't see the relevance.

15 THE COURT: I'll overrule the objection, but
16 where are you heading with this?

17 MR. LANDSMAN: Do you want me to hand up a
18 copy, your Honor?

19 THE COURT: Yes, please.

20 Q Now let me ask you to look at 26.3(a)(7) which
21 is part of the uniform definitions and discovery requests
22 promulgated by the judges of the Eastern and Southern
23 District. And they have a definition of concerning, see
24 that?

25 A Yes.

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1 Q Now is it your testimony that notwithstanding
2 the fact that the judges of the Eastern and Southern District
3 had a clear understanding of concerning and indeed wrote it
4 into a local rule, you didn't know what concerning meant?

5 A Can you read that question back, please.

6 (Whereupon the question was read.)

7 MR. HUGHES: I'm going to object, your Honor.

8 A Yes, well --

9 THE COURT: Overruled.

10 A In the context of the discovery propounded by
11 Hasbro, yes, it was vague and indefinite. I'm -- I guess I
12 got to accept your testimony that these are in fact the rules
13 of the Eastern District and Southern District, I don't know
14 if there's any testimony about that, maybe the court can take
15 judicial notice of that fact, but with great respect for
16 those courts and the judges on those courts, they put a
17 definition of concerning in here which is totally vague,
18 indefinite, doesn't help out at all. The term concerning
19 means relating to, referring to, describing, evidencing, or
20 constituting. Well, relating to, that's pretty broad, I've
21 always had difficulties with these interrogatories, what
22 words do you pick, referring, relating to, regarding,
23 concerning. And when you talk about legal fees, do you want
24 a copy of the contingency fee agreement, is that what you're
25 asking in this interrogatory because that concerns legal

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1 fees, for example. Do you want copies of every single
2 document that comprises correspondence between the parties
3 because that concerns legal fees and the costs of
4 disbursements and so forth, that concerns --

5 THE COURT: Just restrict yourself to the
6 answer to the question, Mr. Purcell.

7 Q Do you have anything to add?

8 A I guess the answer to the question is that,
9 yeah, I still have trouble despite what the Eastern District
10 and Southern District may say on that point, I still have
11 trouble with the word concerning and their definition in
12 their local rules.

13 Q When did you first get the documents from
14 Mr. Haritatos that you told us in December you had ready for
15 us to look at?

16 A I think it was in either late September or
17 early October.

18 Q And when were they first transferred to you
19 from Wall, Marjama?

20 A I believe it was December 6th, 2006.

21 Q So you had the documents at Wall, Marjama for
22 at least two weeks, possibly three weeks before you left
23 Wall, Marjama and you did not produce them to us, correct?

24 A Correct.

25 Q Now, you've looked at the transcript of your

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1 voice mail from December 14th, right?

2 A Yes.

3 Q And is there anything about that transcript
4 you contend is inaccurate?

5 A Can you point me to the exhibit again?

6 Q 31.

7 A 31. I can't contend it's an accurate -- I do
8 not have a crisp recollection of leaving you this particular
9 voice mail.

10 Q Okay. You said in the voice mail it may be
11 some of the stuff that the magistrate's order required
12 Haritatos to produce. Did you at any point confirm that
13 these were all the documents that Judge DiBianco's order
14 ordered you to produce?

15 A I don't know what I was referring to there. I
16 hadn't seen the file in a couple months.

17 Q My question was did you ever confirm that
18 those two boxes of documents were all of the documents that
19 Haritatos was ordered to produce?

20 A They weren't all the documents that were
21 ordered to be produced by the August 11th order.

22 Q And since August 11th have you produced to us
23 any documents other than those two boxes?

24 A In connection with the judge's order?

25 Q I said since August 11th, have you produced

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1 any documents other than those two boxes?

2 A Not that I can recall.

3 Q So you still don't know if you've complied
4 with the judge's order, do you?

5 A I think I have. I guess we're here today to
6 find out whether Judge DiBianco believes we've complied with
7 his order. In fact I think I previously complied with parts
8 of that order with regard to the Nora Haritatos trademark
9 application.

10 Q Let me ask you to look at your responses to
11 our requests for admission, which is Exhibit 13. And I'd
12 like to direct you specifically to request Number 13 to start
13 with. And that request asked the plaintiff to admit that
14 persons other than you are currently using, without your
15 authorization, the words Candyland or Candy Land, two words,
16 in connection with the sale of candy, correct?

17 A Correct.

18 Q And you said that plaintiff had made
19 reasonable inquiry and the information known or readily
20 obtainable by plaintiff is insufficient to enable plaintiff
21 to admit or deny that request. Right?

22 A Yes.

23 Q Now, did you go on the internet and look at
24 any of the websites that we cited to you?

25 A Did I personally?

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1 Q Yes.

2 A I don't know, I might have, and I might have
3 gone onto the Dolle's website because you took their
4 deposition in the case, I don't recall.

5 Q And you heard a representative of Dolle
6 testify that they call their business Candyland, right, at
7 that deposition?

8 A Well, I'm not sure I heard him say that.

9 Q Well, the deposition will eventually be in
10 evidence once you tell us whether there are other objections
11 you have to it. But did you direct anybody else, either your
12 client or anyone at your office, to look at any of the
13 websites that we cited to you in the requests to admit?

14 A I don't recall. Are you asking for
15 attorney-client privileged information what I would have
16 talked to my client about in the actual case?

17 Q I'm not asking for any legal advice that you
18 gave to your client, I'm asking you whether you either
19 directed your client or asked your client to look at any of
20 the websites that had been cited in our request to admit and
21 I do not believe that calls for privileged information.

22 MR. HUGHES: Objection, your Honor, I submit
23 that it does talk about specific communication with a client,
24 therefore it's privileged, I so therefore object.

25 THE COURT: Well, is it for the purpose of

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1 giving legal advice? I think not, I think it's -- well,
2 let's rephrase that to ask if anyone other than the client.

3 Q Okay. Mr. Purcell, did you instruct anyone
4 other than your client to look at these websites?

5 A Like my secretary, like work product?

6 Q Anybody other than your client.

7 THE WITNESS: Your Honor --

8 MR. HUGHES: I'll object that that's probably
9 attorney's work product.

10 THE COURT: No, I'll overrule that, that's
11 qualified privilege and --

12 MR. HUGHES: Yeah, but it's qualified but
13 there has to be some foundation to show that the
14 qualifications have been met to allow that type of inquiry.

15 THE COURT: Well, has to be some foundation to
16 show that Hasbro can't --

17 MR. HUGHES: So there has been no foundation.

18 THE COURT: -- can't get --

19 MR. HUGHES: I'll object on the basis not only
20 work product but foundation.

21 THE COURT: Overruled on work product.

22 A I don't -- to answer the question, I don't
23 recall asking.

24 THE COURT: You have much more?

25 MR. LANDSMAN: Excuse me, your Honor?

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1 THE COURT: You have much more?

2 MR. LANDSMAN: A fair amount, your Honor. I
3 want to go through, I don't want to go through all of these
4 websites, that would take way too long, but I just want to go
5 through one as an example if that's all right and then there
6 are a couple other questions.

7 THE COURT: And do you have other witnesses,
8 too?

9 MR. LANDSMAN: I was going to call
10 Mr. Haritatos and to the extent that we still need to explain
11 anything about those January 2008 requests, I could call
12 Ms. Kramer to explain part of what was involved in them.

13 THE COURT: So you have two other witnesses?

14 MR. LANDSMAN: But they should be very short.

15 THE COURT: Okay, go ahead.

16 Q Thank you. Okay. Let's look at that website
17 that's at candylandstore.com and that is referenced in
18 request to admit, let's see, where is it? It's Number 19. I
19 can put them up on the screen, I can, they're also in
20 exhibits in our binder, and the exhibits in our binder are at
21 Exhibit 39. Now, in your response to Number -- Number 19
22 reads, "Candyland, Inc. in St. Paul, Minnesota offers candy
23 for sale via the internet, at www.candylandstore.com and your
24 response reads, "Plaintiff lacks knowledge or information,
25 plaintiff has made reasonable inquiry, and the information

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1 known or readily obtainable by plaintiff is insufficient to
2 enable plaintiff to admit or deny."

3 So let's see how easily obtainable this
4 information is. I've asked Ms. Kramer to have typed in that
5 website address, do you see, Mr. Purcell, that it takes you
6 to a website called candylandstore.com?

7 A Yes.

8 Q And do you see that it offers candy for sale?

9 A What does -- it does, the website?

10 Q The website offers candy for sale?

11 A This website page, are you referring to the
12 one on the screen or the one in the book?

13 Q I think they're the same but --

14 A I don't know.

15 Q Does it?

16 A Which one do you want me to look at?

17 Q Look at the one on the screen if that's what
18 you would prefer or look at the one in the book if you would
19 prefer, it's the same thing.

20 A Let's look at --

21 Q Home page for candylandstore.com.

22 A Let's look at the one in the book.

23 Q Let's stay in the book if you prefer, Page 1
24 and it says, "If you've scheduled a pickup time at the
25 St. Paul store, no need to wait in line," see that?

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1 A I'm on Page 1 of Exhibit 39.

2 Q Yeah. It says Candyland at the top, right?

3 A Yes.

4 Q And in a nice design, whether nice or not,
5 it's in a design. And it shows you a bunch of candy, right?

6 A Yes.

7 Q Now, if you click on products and go to
8 page -- another page there towards the back of the exhibit,
9 you see that products that they're offering for sale, right,
10 click on them and add to your cart and they're all candies,
11 aren't they?

12 A I see something that's our products, lists the
13 products, trying to see if they allegedly offer them for
14 sale.

15 Q You're on the page that has the heading jelly
16 candies, well, let's stay on the page that says our products.
17 Okay. And it says, "At Candyland you'll find sweet
18 mouth-watering, crunchy, chewy, or salty and always
19 delicious," and then it lists a whole bunch of candies,
20 right?

21 A It -- I'm sorry, I'm trying to read at the
22 same time you're asking me questions and I'm not following
23 your questions.

24 Q Are we on the same page now, the one that says
25 "Our products"?

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1 A I have that, it's the fourth page of that
2 exhibit.

3 Q Yeah, and it tells you, it has a list of
4 products that are -- you can find at Candyland, right?

5 A I don't know, it says you can find them at
6 this Candyland or where, just our products, that's what it
7 says, our products, "At Candyland you will find sweet,
8 mouth-watering, crunchy, chewy, or salty and always
9 delicious."

10 Q And then a list of products?

11 A Lists the products.

12 Q And you would not understand that to mean that
13 they're offering those for sale?

14 A That who is?

15 Q Candylandstore.com, and the Candyland store in
16 St. Paul for that matter.

17 A I don't understand that.

18 Q Okay. Turn the page. You ever ordered
19 products over the internet?

20 A I have tried and I am pathetically inept at it
21 and my credit card is not taken so I rely upon other people
22 to try to get stuff off the internet.

23 Q But you understand that where it asks you to
24 click "add to cart" it's asking you if you want to order a
25 product?

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1 A That's my understanding what that is.

2 Q When you get to the product it asks you for
3 your credit card information and then you order it?

4 A I understand that's generally what happens
5 when you click on something that says "add to cart" there's
6 some process for ordering product, yes.

7 Q Okay. And then if you go a few more pages
8 back under check out, it gives you shipping options?

9 A Yes.

10 Q Do you understand that to mean you order and
11 they ship to you?

12 A They, whoever, whose ever behind this website.

13 Q This website called candylandstore.com, yes?

14 A That's what I understand that to mean, yes.

15 Q So you understood you could go on the
16 candylandstore.com website and order candies, right?

17 A That I could?

18 Q Yes. Assuming you had a good credit card.

19 A That's what I gain from this document,
20 Exhibit 39, which I note has dates on it January 30th, 2008,
21 and February 28th, 2008.

22 Q Right, that's when they were printed out.

23 A Yep, so what's your representation about this
24 exhibit, that I had this in my possession some time ago or
25 something?

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1 Q My question to you, Mr. Purcell, is simply, is
2 it correct that you understand from looking at this website
3 that you can indeed order candies from candylandstore.com?

4 A I don't know if it's from candylandstore.com
5 but I would presume it's the, yeah, company that's operating
6 this website.

7 Q Called candylandstore.com?

8 A Called the website at candylandstore.com.

9 MR. HUGHES: Objection, your Honor, I don't
10 think there's been proper foundation. That's dated
11 February 28, 2008, there's been no foundation or testimony
12 that this website existed in its present form back in 2006,
13 early 2007 when he was under an obligation to comply with the
14 court's order, so I would object to it and move to strike
15 this exhibit and any testimony relating to it on the basis
16 there hasn't been any foundation that this is an accurate
17 replication of the website as it existed at the time that
18 counsel takes the position he was required to respond to the
19 court's order.

20 MR. LANDSMAN: First of all, it's already been
21 admitted without objection from them; secondly, the point I'm
22 making right now and there is a continuing obligation under
23 the Federal Rules to supplement that it is very -- the point
24 I'm making is a very simple one, it is very simple to
25 ascertain and confirm what is on a website and that is

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1 therefore within reasonable inquiry or information readily
2 obtainable by plaintiff under the Federal Rules.

3 Secondly, if necessary, we could, I am happy
4 to make the representation that this is how the website
5 existed as of then because I looked at it at that time and
6 that's why we wrote the request to admit the way we did.

7 THE COURT: All right. Well, based upon the
8 representation, I'll overrule the objection. Let's move on,
9 please.

10 Q So isn't it a fact, Mr. Purcell, that a
11 reasonable inquiry of simply visiting the website address
12 that's provided in the request for admission would have
13 allowed plaintiff to admit what we asked?

14 A No.

15 MR. LANDSMAN: Again, I'm not going to go
16 through all the other ones but it would be the same sets of
17 questions.

18 THE COURT: Okay.

19 Q Let me ask you to look at the second set of --

20 A Can I have that last question read back that I
21 said no to.

22 THE COURT: Go ahead.

23 (Whereupon the question was read.)

24 THE COURT: What's your answer?

25 THE WITNESS: It's still no.

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1 THE COURT: Okay.

2 Q Let me ask you to look at Exhibit 11 which is
3 plaintiff's response to our second set of interrogatories.
4 And this was served October 16th, 2006, there's a space for
5 verification but it's not signed. Did you ever ask your
6 client to verify the responses and send them to us?

7 A I try to habitually do that, it's required
8 under the rules, so I presume I did, but I have no current
9 recollection whether I did or not.

10 Q Okay. Did you ask Mr. Haritatos whether he
11 believed that customers of the Toys "R" Us store in Times
12 Square have been confused or mistakenly believed that
13 Haritatos is a source or sponsor of Toys "R" Us' use of the
14 Candyland mark?

15 MR. HUGHES: Objection, attorney-client
16 privilege.

17 MR. LANDSMAN: It's an interrogatory that was
18 asked, I want to find out whether --

19 THE COURT: Which interrogatory is it?

20 MR. LANDSMAN: Sorry, let me ... it's
21 interrogatory number 6. I ask this, your Honor, because
22 before Judge Hurd, it was represented that there was no
23 evidence of actual confusion, and yet this response says yes,
24 that they do contend that.

25 MR. HUGHES: Your Honor, that's a contention

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1 in the interrogatory which is usually properly answered by
2 the counsel, plaintiff himself may not know what the legal
3 contentions are of the case.

4 THE COURT: That's correct. What's your
5 point, Mr. Landsman? I'm a little confused.

6 MR. LANDSMAN: Well, my point is that here
7 he's saying he contends there's been actual confusion yet
8 before Judge Hurd he represented there wasn't, and I want to
9 know whether this response was made in good faith.

10 THE COURT: Response being made by
11 Mr. Purcell?

12 MR. LANDSMAN: Well, it's a response of -- it
13 asks, does plaintiff contend, and it's, although it's phrased
14 as a contention, it's basically asking for a fact.

15 MR. HUGHES: If that were the case, your
16 Honor, it would have been appropriate to phrase the
17 interrogatory like that. Reading it, I certainly conclude it
18 was a contention in the interrogatory.

19 THE COURT: Well, it's unclear whether
20 Mr. Haritatos actually signed this document in any event.

21 MR. PURCELL: I think I can explain it, your
22 Honor.

23 THE COURT: I think we'll just move on to
24 something else. I'm going to sustain the objection. It
25 would necessarily require me to start viewing the positions

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1 and the statements made before Judge Hurd and I want to try
2 to restrict this hearing to what's before me to the extent
3 possible.

4 MR. LANDSMAN: And your Honor, again, in the
5 interest of time, I'll stop my questioning there.

6 THE COURT: Okay. Cross?

7 MR. HUGHES: Your Honor, could we have this
8 marked as an exhibit, please.

9 THE COURT: Sure. Is this something new?

10 MR. HUGHES: I think it would be Plaintiff's
11 35.

12 MR. LANDSMAN: Could I just ask what it is
13 being offered for?

14 MR. HUGHES: Yes. There was some testimony
15 about production of documents during the course of the
16 proceeding before the Patent and Trademark Office and there
17 was I think an argument raised by you that there was a
18 protective order in place with respect to that, and this is
19 being offered to be that protective order and what could be
20 done to use the documents obtained by Hasbro during the
21 course of that proceeding before the Patent and Trademark
22 Office.

23 MR. LANDSMAN: And just to save a little time,
24 could you point out for me, because I haven't seen this in
25 awhile, where the restrictions are.

Robert Purcell - Cross by Mr. Hughes

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1 MR. HUGHES: Yes, the provisions of the
2 protective order start on Page 15 of Exhibit 35 marked for
3 identification.

4 THE COURT: Do you have questions other than
5 ones relating to this exhibit? Do you have questions --

6 MR. HUGHES: A few, your Honor.

7 THE COURT: Why don't you go ahead with those
8 and let Mr. Landsman look at that and we'll come back to
9 that.

10 CROSS-EXAMINATION BY MR. HUGHES:

11 Q Mr. Purcell, you were shown by counsel for
12 Hasbro a local rule of the Southern and Eastern District, do
13 you recall that?

14 A Yes.

15 Q And do you recall you said I think that you
16 are admitted to practice at least before one or both of those
17 courts?

18 A Both of those courts back about 1979.

19 Q And when you were responding to the discovery
20 requests in this particular action, did you use or rely upon
21 the rules of the Southern or Eastern District?

22 A No.

23 Q When was the last time you can recall even
24 looking at the rules of -- the local rules of the Southern
25 and Eastern District in general or in particular Rule 26.3

1 which defines the term according to those courts
2 "concerning"?

3 A It's been maybe a couple of decades for the
4 Eastern District and I think many years for the Southern
5 District.

6 Q Now, in response to your objection to the
7 definition of the word "concerning", did counsel for Hasbro
8 call your attention to this local rule of the Southern and
9 Eastern District?

10 A I was unaware of any intention by Hasbro to
11 incorporate by reference, if you will, the meaning of
12 "concerning" set forth by the Southern District or the
13 Eastern District.

14 Q Well, what was your concern about the word
15 "concerning"?

16 A "Concerning" is a nebulous word, it's very,
17 very broad and the boundaries of it are uncertain. Moreover,
18 it's so broad as to be encompassing of duplicative stuff,
19 burdensome stuff and so forth. For example, when we're
20 requested to get documents concerning attorney's fees, do
21 they really want me to produce a copy of the contingency fee
22 agreement with a client? Do they want me to produce copies
23 of the negotiation documents relating to that contingency
24 agreement? They all concern, they all relate to attorneys'
25 fees in some broad sense of the term concern or relate.

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1 Q And if that were the case, would you have
2 interposed or did interpose an objection on the ground of
3 attorney-client privilege?

4 A Well, I did. The focus of Mr. Landsman's
5 argument in court was that he wanted, as he stated in his
6 opposition papers before Judge Hurd, he wanted the billings
7 and he wanted the day notes, whatever those are. And as far
8 as the billings, I had I think urged before Judge DiBianco as
9 well as before Judge Hurd that I'm okay with turning the
10 stuff over provided there's some mechanism for addressing
11 what I believe is going to be substantial attorney-client
12 privileged information in those billing statements.

13 Q And are you aware of any of the means by which
14 you could produce a document and yet maintain the
15 confidentiality of any communications contained within that
16 document?

17 A Can you repeat the first part.

18 Q Yeah. Are there ways by which an attorney can
19 comply with the request and provide invoices of whatever
20 services he may have provided, and yet be able to protect
21 confidentiality of what perhaps he may have been advising the
22 client or asking the client to do?

23 A Well, one may I guess withhold the entire
24 document saying that there's privileged stuff in there; one
25 may try to mask out the material that one claims to be

1 covered by the attorney-client privilege; one may ask the
2 court for in-camera inspection of the documents, let the
3 court make that determination. So there are a few different
4 mechanisms for I guess achieving a balance where the
5 adversary gets the information they need which is, hey,
6 please verify that when you're claiming \$41,000 in
7 out-of-pocket legal fees and costs which was not on a
8 contingency fee basis, your Honor, in the Trademark Office
9 proceeding, show me that that was actually billed to the
10 client, okay. I'll do that, but let's balance that against
11 the need not to reveal attorney-client privileged information
12 that may be set forth in that billing statement.

13 Q Now let's -- is there a distinction between
14 fees and disbursements and costs?

15 A Well, sometimes fees can broadly encompass
16 charges for say attorneys or paralegal work as well as
17 disbursements. Usually disbursements and costs are
18 considered the same thing, sometimes fees are distinguished
19 from disbursements and costs, but sometimes the word fees is
20 broad enough to encompass both sort of time as well as
21 disbursements.

22 Q Is there difference between the billing that
23 was done when you represented the plaintiff Mr. Haritatos in
24 the Trademark Office and fees in this particular action?

25 A Yes. In the Trademark Office, that was on an

1 hourly rate basis, there was no contingency fee arrangement
2 at all with Mr. Haritatos at that time.

3 Q Now at this stage of the proceeding, based
4 upon the ruling of Judge Hurd on the motion for summary
5 judgment, where does that issue stand with respect to the
6 recovery of fees in that Trademark Office?

7 A It's moot at the moment because the current
8 position of the lawsuit and of Judge Hurd is that the
9 plaintiff is not entitled to any damage recovery including
10 damages in the nature of the fees and costs associated with
11 the Trademark Office action at this juncture in the lawsuit.
12 That issue is not finally decided or dead but that's the
13 current posture.

14 Q Now, one of the examples you gave is what I
15 would call redaction of privileged communications. Did
16 Mr. Landsman ever suggest that to you as a way to resolve or
17 perhaps reduce discovery dispute?

18 A Not to my recollection.

19 Q Did Mr. Landsman, you also mentioned there's a
20 way a court can take a look at a document, is that sometimes
21 referred to as an in-camera inspection?

22 A Yes.

23 Q Was that ever suggested by Mr. Landsman?

24 A No, I'm pretty sure no.

25 MR. HUGHES: Your Honor, may I address some

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1 questions now about the protective order? Would you like me
2 to continue with the rest of my questions before I go to
3 that?

4 MR. LANDSMAN: Your Honor, I have no objection
5 to the admission of -- does it have a number?

6 MR. HUGHES: 35.

7 MR. LANDSMAN: 35, and would just point out
8 that what I was referring to was on Page 23 where it says,
9 "Disclosure of information protected under the terms of this
10 order is intended only to facilitate the prosecution or
11 defense of this case," that was what I was looking for.

12 MR. HUGHES: But I submit, your Honor, the
13 parties that are involved in this particular Patent and
14 Trademark Office are Hasbro and Mr. Haritatos and they always
15 have the right to use the documents themselves as long as
16 they don't disclose it to third parties or if there is an
17 issue with respect to the use of those documents, they could
18 always have gone back and petitioned the board, Trademark
19 Office for relief, either by stipulation or otherwise.

20 So the argument that counsel had made that
21 this was, what had been produced by Mr. Haritatos in the
22 Trademark and Patent proceeding was not usable or
23 disclosable, our position has been it had already been
24 disclosed in that and it was in the possession of counsel for
25 Hasbro.

Robert Purcell - Cross by Mr. Hughes

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1 MR. LANDSMAN: Well, I've never understood
2 that I had the ability as a party to disregard a court order.
3 And this is an order of the TTAB, your Honor, says you can
4 only use it in these proceedings. This was an order that,
5 and furthermore, plaintiff himself by this point had stayed
6 those proceedings so there was no way to go back to the
7 board. What we'd asked, what we said in the discovery
8 responses is you can't say it's been produced in the TTAB and
9 therefore you don't have to produce it again, but we can't --
10 because for, among other reasons, Toys "R" Us is entitled to
11 these documents too, but we were not, I didn't feel that
12 myself entitled to disregard the order of the TTAB,
13 particularly not with a counsel who, you know, has taken the
14 accountant's attitude towards discovery that your Honor once
15 noted of him. I was not going to risk being in contempt of
16 the TTAB. It would have been a very simple thing to and as
17 we also pointed out and I think this was a more important
18 point, that in responding this way, the plaintiff hadn't
19 even, didn't even seem to know or care what he had or hadn't
20 produced in the TTAB and what he had withheld, and that was
21 what we brought up in the letter where we said, you say you
22 produced this before but you didn't, therefore produce it,
23 and he said, well, if I objected to it before, then maybe I'm
24 not going to produce it again.

25 THE COURT: Go ahead, Mr. Hughes.

Robert Purcell - Cross by Mr. Hughes

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1 Q And what was your understanding with respect
2 to the limitations, if any, imposed upon counsel for Hasbro's
3 access to the documents that you had previously produced in
4 the proceeding before the Patent and Trademark Office?

5 A If I -- my position was if I produced them to
6 Hasbro in connection with the Trademark Office proceedings,
7 they were capable of being used in this instant lawsuit. I
8 didn't have any objection to that, in fact when I tell them
9 these documents have already been produced, implicitly I'm
10 saying use them. It makes no sense for me to make copies of
11 something I've already provided to you, you already have, and
12 for me to resend them to you, it's just implicit, go ahead
13 and use them, I've produced them to you already, you have
14 them, there's no need to ask me to redo the whole thing over
15 again.

16 Q In response to that, did Mr. Landsman say that
17 he was concerned about being in violation of the order of the
18 Patent and Trademark Office?

19 A I haven't heard anything about that to my
20 recollection until today from Mr. Landsman.

21 Q Did Mr. Landsman approach you about perhaps
22 having a stipulation to the fact that the documents could be
23 used that had been produced before the proceeding in the
24 Patent Office?

25 A I don't recall Mr. Landsman doing that.

Robert Purcell - Cross by Mr. Hughes

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1 Q Would you look at Defendant's Exhibit 1 which
2 is the order of this court.

3 A Yes.

4 Q Directing your attention to Page 8, what was
5 your understanding that Judge DiBianco was ordering you to
6 produce within a certain period of time?

7 A He was ordering that we produce customer
8 lists.

9 Q Let's start with that one. Did you produce a
10 customer list?

11 A We did not produce a customer list because we
12 have never, Mr. Haritatos has never had a customer list.

13 Q And how do you know that?

14 A I was told that repeatedly by Mr. and
15 Mrs. Haritatos.

16 Q Do you know whether they had made some type of
17 a diligent look for that?

18 MR. LANDSMAN: Your Honor, I was blocked from
19 these kinds of questions on the grounds of attorney-client
20 privilege.

21 MR. HUGHES: I'll withdraw that question then.

22 THE COURT: If the door's open, then I'll let
23 you pursue it. I think that we're getting somewhat afield
24 and detailing this order to death, but, you know, Mr. Purcell
25 is entitled to a full hearing and that's what he's going to

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1 get.

2 Q What was the next thing that was asked for
3 according to your understanding of this order?

4 A Well, didn't want to totally ignore the
5 customer list information because I knew that besides the
6 customer list, Mr. Landsman was basically asking for customer
7 identities, that is customer identities and addresses and
8 their geographic locations and so forth, so I thought, well,
9 in good faith I should interpret this since I don't have any
10 customer lists, to try the best we can to get information
11 that we have in our possession, custody, control that would
12 reveal whatever information we have about the customer names
13 and addresses and that was through the UPS manifests, the
14 5,593 pages of stuff.

15 Q Now what would the manifests disclose or what
16 did they disclose?

17 A You know what, I've never taken a close look
18 at them, I think that they show the shipping date, the UPS
19 shipping number, the addressee to whom the stuff is shipped,
20 but I don't know.

21 Q Would they disclose what the contents of the
22 box being shipped were?

23 A I don't even know that.

24 Q And what about the application for Turkey
25 Joints registration; how did you respond to that provision of

1 Judge DiBianco's?

2 A Well, there were a couple ways I responded. I
3 first said and I urged Judge DiBianco and Judge Hurd that it
4 was irrelevant, this application registration had no bearing
5 on the instant lawsuit which related to the trademark
6 Candyland. That argument was unpersuasive. Then I looked
7 back, however, and thinking, well, I have produced stuff, do
8 we have any of the stuff that I haven't produced anywhere in
9 the file, and lo and behold, I found a letter dated in
10 June 2006, two months before Judge DiBianco's August 11th
11 letter in which I had provided to Hasbro's counsel all the
12 stuff that we had on this application for the Turkey Joints
13 registration, that is the Nora Haritatos application. So
14 we'd already given the stuff, whatever we had, to Hasbro, and
15 yet Hasbro was persisting to tell the court they didn't have
16 it, we were being obstreperous, we were stonewalling
17 discovery and so forth on this, so we had already produced
18 whatever we had at that time.

19 Q And is that contained with one of the exhibits
20 that you provided to the court?

21 A It's in two of the exhibits that plaintiff
22 provided to the court.

23 Q Draw the court's attention, please.

24 A Yes. It starts Exhibit 22 which is again
25 something I pulled off the U.S. Trademark Office database

Robert Purcell - Cross by Mr. Hughes

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1 recently showing data regarding that earlier registration
2 that's 25 to 30 years old and then Exhibit 23 is a copy of my
3 letter dated June 1st to Mr. Landsman's associate Michael
4 Sant'Ambrogio in which I enclose various documents and some
5 of those I've attached to the letter in Exhibit 23. Those
6 that I've attached to the letter in Exhibit 23 are those
7 pertaining to the registration or application at issue, the
8 Nora Haritatos application that is the thin shells
9 registration, and so forth.

10 Q To your knowledge does the plaintiff have any
11 other additional materials related to Turkey Joints
12 registration that have not already been produced?

13 A To my knowledge, no.

14 MR. LANDSMAN: I just want to again note, your
15 Honor, this is opening up what they claim was privileged.

16 MR. HUGHES: The question was to his
17 knowledge, sir.

18 MR. LANDSMAN: And he presumably could only
19 have that knowledge from talking to his client.

20 THE COURT: All right. What else do you have,
21 Mr. Hughes?

22 Q The last provision requested has to do with
23 damages. Do you see that?

24 A Yes.

25 Q And had you provided to counsel for Hasbro any

1 documents related to damages?

2 A I had provided several of the required initial
3 disclosures and supplemented those initial disclosures
4 throughout litigation, your Honor, to specify the types of
5 damages sought, the calculation of those damages as I learned
6 them, and reference to documents and deposition exhibits
7 where we were relying on those exhibits. The term damages
8 here is not -- is broad. And if we look at what Mr. Landsman
9 was seeking and what was at issue here, it was the damages
10 pertaining to the attorneys' fees for the Trademark Office
11 action and indeed that's what Mr. Landsman was arguing to
12 Judge Hurd as being the issue on damages. That's the issue
13 regarding damages, that's the one I had trouble with on the
14 basis of the attorney-client privilege and information in
15 those billing statements that would be part of any
16 production.

17 Q Well, the course of the Trademark Office type
18 of -- trademark lawsuit, are there other type damages that
19 can be recoverable by a plaintiff for a claim of trademark
20 infringement?

21 A Yes.

22 Q And what are some of those?

23 A The two main ones are a recovery of actual
24 damages, that is damages to the plaintiff and as specified in
25 initial disclosures and I think in interrogatory responses,

Robert Purcell - Cross by Mr. Hughes

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1 we're requesting a reasonable royalty based upon the sales of
2 candy by the Hasbro and Toys "R" Us defendants. That has
3 been a measure of damages by many courts in the United
4 States. In addition to that, and to some degree overlapping
5 with that, is a request for the defendant's profits from the
6 sales of those infringing candy products.

7 Q In whose possession, custody, or control would
8 that information related to that, I'll call second type of
9 damages, be?

10 MR. LANDSMAN: Your Honor, I'm going to object
11 on relevance here. The questions we asked were, they claimed
12 attorneys' fees as an element of damages, we asked for
13 documents evidencing them, they didn't produce them, that's
14 all we were talking about. We're not talking about all this
15 other stuff here.

16 THE COURT: You are referring to the TTAB?

17 MR. LANDSMAN: That's what I had, I understood
18 plaintiff to be contending that he was going to claim as
19 damages, not as costs in this action but as damages the fees
20 and anything else he claimed in the TTAB proceeding. I
21 wasn't sure whether they were claiming fees in this
22 proceeding as well as an element of damages and I said okay,
23 produce it, if you're claiming it.

24 THE COURT: All right. I'm going sustain the
25 objection at this point. Anything further, Mr. Hughes?

Robert Purcell - Redirect by Mr. Landsman

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1 Q When you read Judge DiBianco's order, it
2 indicated that plaintiff's letter motion dated June 26, 2006
3 is granted and close of all discovery is extended to November
4 30th, 2006; did you read that to be a ruling in favor of the
5 defendant on any motion that they had filed?

6 A I frankly do not recall what I thought when I
7 first read Judge DiBianco's order, but I am quite confident
8 that I've never interpreted this portion of the order
9 granting plaintiff's letter motion dated June 26, 2006 as
10 referring to the Hasbro letter motion.

11 MR. HUGHES: That's all, thank you, Judge.

12 THE COURT: Any --

13 MR. LANDSMAN: Just quickly, your Honor.

14 REDIRECT EXAMINATION BY MR. LANDSMAN:

15 Q You were at the deposition of Mr. Haritatos
16 and of Sharon Haritatos, right, you defended those
17 depositions?

18 A Yes.

19 Q And do you recall Mr. Haritatos testifying in
20 his deposition about keeping track of internet orders by
21 website reports?

22 A I don't recall that.

23 Q Let me ask you to look at Exhibit 19 of our
24 exhibits.

25 MR. HUGHES: Objection, your Honor, beyond the

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1 scope of cross-examination. If it's going to go beyond the
2 scope, I think he's going to make him his witness and he
3 can't --

4 MR. LANDSMAN: This directly relates to
5 Mr. Hughes' question about whether the Fed Ex labels
6 satisfied our document request, your Honor.

7 THE COURT: For the customer information?

8 MR. LANDSMAN: Yes.

9 THE COURT: All right, I'm going to allow it.
10 What exhibit are you looking at?

11 MR. LANDSMAN: Exhibit 19, Page 113. I'm
12 sorry, Exhibit 19, Page -- the bottom of Page 112 of the
13 deposition to the top of Page 113. It's the Spero Haritatos
14 deposition.

15 THE COURT: Yes.

16 Q You see there that he says that they keep
17 track of internet sales by website reports?

18 A Yes.

19 Q Did you produce any website reports to us?

20 A Not that I know of.

21 Q Did you ask your client for any website
22 reports?

23 A Yes.

24 Q What did he say?

25 A That -- that -- there's no printouts of

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1 anything with regard to the web, that the customer
2 information they have with regard to customer identity, all
3 right, customer names and addresses, the things they have
4 relate only to the UPS manifest, there is no other
5 information.

6 Q Did you ask him what was in the website
7 reports?

8 A I don't recall.

9 Q Did you ask him whether the website reports
10 could be printed out regardless of whether they actually had
11 already been printed out?

12 A I don't recall.

13 MR. LANDSMAN: No further questions.

14 MR. HUGHES: Nothing further, your Honor.

15 THE COURT: Okay. You're excused,
16 Mr. Purcell.

17 THE WITNESS: Thank you.

18 (Whereupon the witness was excused.)

19 MR. HUGHES: Exhibit 35 is now in evidence,
20 your Honor?

21 MR. LANDSMAN: Without objection.

22 THE COURT: Okay, Exhibit 35 is received.

23 MR. PURCELL: Should I leave, these are my
24 exhibit books, can I take those back with me?

25 MS. KRAMER: Actually one of those is mine, I

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1 gave --

2 MR. LANDSMAN: We're going to need at least my
3 book for the next witness.

4 MS. KRAMER: Just leave it there.

5 THE COURT: Take your book back, Mr. Purcell,
6 leave the other one there.

7 MS. KRAMER: Leave Hasbro's book, I gave
8 Hasbro exhibits to your counsel.

9 MR. LANDSMAN: We'd like to call Spero
10 Haritatos, please.

11 THE COURT: Mr. Haritatos, please come
12 forward.

13 MR. PURCELL: Your Honor, sorry to have this
14 logistics problem, I think both of these books are my exhibit
15 books. Do I have any on the table?

16 THE COURT: Why don't you return to your table
17 and we'll see what we have.

18 THE CLERK: Mr. Haritatos, please raise your
19 right hand.

20
21 S P E R O T . H A R I T A T O S , called
22 as a witness and being duly sworn, testifies as follows:

23 THE COURT: Go ahead.

24 DIRECT EXAMINATION BY MR. LANDSMAN:

25 Q Good afternoon, Mr. Haritatos. I don't think

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1 we've met before but I'm -- you know who I am, I'm
2 Mr. Landsman, I represent Hasbro here, and you're the
3 plaintiff in this case, correct?

4 A Yes.

5 Q Mr. Purcell is your attorney?

6 A Yes.

7 Q And he's been your attorney since the case
8 began?

9 A Yes.

10 Q Okay. Have you ever looked at our first
11 request to admit?

12 A I don't recall.

13 THE COURT: I'm sorry, you have to speak up.

14 A I don't remember.

15 Q Do you remember looking at any of the websites
16 that had Candyland in their name?

17 A I don't remember.

18 Q Were you ever asked to look at any websites of
19 internet sites that call themselves Candyland?

20 A No, I don't remember.

21 Q And let me ask you to look at what's
22 Exhibit 11 in that binder of documents which is response to
23 our second set of interrogatories.

24 A Is this 11, the page thing?

25 Q Excuse me?

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1 A ll on here?

2 Q Yes. It's entitled plaintiff's response to
3 defendant Hasbro, Inc.'s second set of interrogatories to
4 plaintiff. Have you ever seen that before?

5 A Vaguely.

6 Q Were you ever asked to read through it and to
7 verify the responses?

8 A I don't recall.

9 Q Okay. Let me ask you to look at Exhibits 1
10 and 2 in that binder which are Judge DiBianco's order and
11 Judge Hurd's order. Have you ever seen them before, either
12 of them?

13 A I don't recall.

14 Q Do you recall Mr. Purcell or anyone else ever
15 informing you of these orders?

16 A I was told to look for documentation and I did
17 it the best of my ability.

18 Q Okay. When were you asked to look for
19 documentation and what specifically were you asked to look
20 for?

21 A I don't recall the actual time, anything that
22 pertained to shipping.

23 Q Well, there's been testimony that you sent two
24 boxes of documents containing shipping labels to Mr. Purcell.
25 Do you recall that?

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1 A Correct.

2 Q When were you asked to look for those
3 documents?

4 A I believe, I can't -- I think it was October,
5 I think. I can't remember.

6 Q October 2006?

7 A I believe so.

8 Q Now, the photographs of them were put into
9 evidence but it's not close enough to see what the
10 shipping -- what date the boxes were shipped to Mr. Purcell
11 and maybe I think the best way to deal with this would be to
12 ask that Mr. Purcell produce photocopies showing when exactly
13 those boxes were sent and when he received them. Because I
14 suspect that the witness is not going to remember when you
15 did it?

16 A I can't remember.

17 MR. HUGHES: Your Honor, I'm going to object,
18 this is a hearing to provide evidence, it's not a discovery
19 proceeding. And you know, now we're thinking we want
20 additional documents. Counsel, there was an appropriate time
21 to do that in the course of the hearing, to make request for
22 additional documents seems inappropriate.

23 MR. LANDSMAN: Your Honor, he put in
24 photographs saying this is what I got, I'm just asking for a
25 closeup. It's not discovery, it's saying I want a better

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1 picture of what you've already put into evidence so that I
2 can see what is actually there.

3 THE COURT: We have an exhibit number on that?
4 I don't recall seeing it. These are the two boxes that were
5 shipped to Mr. Purcell by Mr. Haritatos?

6 MR. LANDSMAN: It's Plaintiff's Exhibit 30,
7 your Honor.

8 THE COURT: 30?

9 MR. LANDSMAN: Shipping labels in these
10 photographs and they would presumably tell us exactly when
11 they were sent. And all you need to do is just zoom in on
12 it.

13 THE COURT: Let's ask the witness if he has
14 any better recollection. Show him the copy of Exhibit 30.

15 Q Do you have it in front of you, if I can
16 approach the witness?

17 THE COURT: Go ahead.

18 Q It's Exhibit 30 in the different binder, this
19 is the photograph of the boxes.

20 THE COURT: Mr. Haritatos, you see those two
21 boxes in the photographs?

22 THE WITNESS: The top ones?

23 THE COURT: I'm sorry?

24 THE WITNESS: The top ones, your Honor?

25 THE COURT: Well, there are four

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1 photographs --

2 THE WITNESS: Okay.

3 THE COURT: -- of two boxes. Different ways
4 of looking at those.

5 THE WITNESS: Okay.

6 THE COURT: Do you recall when you shipped
7 those?

8 THE WITNESS: I believe it was in October,
9 yeah, I believe it was October, your Honor.

10 THE COURT: All right. Go ahead, continue,
11 Mr. Landsman. If you make that request, I'll reserve on it.

12 MR. LANDSMAN: I do want to make the request.

13 THE COURT: Okay.

14 Q Mr. Haritatos, do you recall testifying at
15 your deposition about website reports that are kept?

16 A I don't recall.

17 Q Let me ask you to look at Exhibit 19 which is
18 a transcript of your deposition. I'll show you the same
19 pages I just showed Mr. Purcell, and let me ask you to look
20 at the bottom of Page 112 of your deposition and top of Page
21 113, I'll ask you whether you recall giving this testimony.
22 "Question: Okay. And do you keep track of your sales via
23 the web?

24 "Answer: Yes.

25 "Question: And how do you keep track of them?

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1 "Answer: The website reports.

2 "Question: So the website gives you reports
3 on the goods that are sold through the website?

4 "Answer: Yes."

5 And you recall that testimony?

6 MR. PURCELL: Your Honor, I'm going to object,
7 I realize that he asked me the same testimony, there's no
8 indication from this testimony whatsoever about these website
9 reports, we're talking about customer identities and
10 addresses and so forth. I just realize that maybe what he's
11 talking about is website reports talking about how many
12 people hit on the website per day and things like that, but
13 maybe Mr. Haritatos can explain but I wonder where he's going
14 with this supposed impeachment testimony.

15 THE COURT: What is the objection?

16 MR. PURCELL: The objection is if he's using
17 this testimony to try to refresh Mr. Haritatos' recollection
18 that he has previously testified that there was customer
19 identity and address information in these website reports,
20 the testimony he previously had does not say that there was
21 customer identity or information in that website report.

22 THE COURT: Overruled. He'll clarify,
23 obviously Mr. Haritatos knows what he does in his business
24 and he'll clarify, just make the question simple.

25 Q Okay. There are website reports that help you

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1 keep track of orders, right?

2 A Not really website reports.

3 Q What would you call them?

4 A They're just, you know, we get like it comes
5 in -- I can't really answer all of it because I'm not
6 familiar with it.

7 THE COURT: You have someone else in the
8 business do that?

9 THE WITNESS: Well, there's -- yeah, Sharon
10 usually helps with it, I'm not that familiar with it.

11 Q Have you seen reports that show orders over
12 the internet and show what they've ordered, who they are,
13 that kind of thing?

14 A I haven't, the only -- the reports that I see
15 are the shipping documents, the manifests from UPS.

16 Q Well, let me ask you when you said you talked
17 about website reports at your deposition what were you
18 referring to.

19 A I believe the manifests, that's what I meant.

20 Q And what is the manifest?

21 A The documentation that UPS creates at the end
22 when we ship out product.

23 Q Okay. Maybe you don't know this, but how, you
24 create a manifest for UPS, right, to ship a product?

25 A Correct.

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1 Q And you create that from internet orders that
2 come over the internet that you pull from the internet,
3 right?

4 A I don't do it, no.

5 Q Somebody does?

6 A Right.

7 Q And that information that gets pulled from the
8 internet tells you who has ordered what on what date, right?

9 A I'm not sure.

10 Q Well, how else would you know what to ship?

11 A I can't answer that, I don't know.

12 Q And you've looked at the manifests that you
13 produced, right?

14 A Well, I gave you all the information that I
15 possibly could give you.

16 Q Okay. And did you look at them though?

17 A Briefly.

18 Q Did you ask Sharon to pull and print out or
19 show you what you referred to as the website reports?

20 A That's what we did is we gave you all the
21 information that we possibly could.

22 Q Did you ask Sharon to give you the website
23 reports?

24 A I asked her to help me look for all the
25 information to give you, yes.

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1 Q Did you ask her for the website reports,
2 Mr. Haritatos, yes or no?

3 A These are the website reports that we did.

4 Q There's other information that you have to
5 have in order to ship products, right?

6 A I -- we don't, I don't have any information
7 available at this point.

8 Q What happened to it?

9 A I'm -- it's just not there, we looked, I
10 don't -- it's not there.

11 Q So is it your testimony that there is nothing
12 that is available either electronically or on paper that
13 would show you what product any given customer ordered over
14 the internet?

15 A Correct, at that time I don't have anything.
16 Now we have available some stuff now because the website
17 wasn't capable of doing a lot of detail.

18 Q Let me ask you to look at Exhibit 20 which is
19 Sharon's deposition transcript and ask you to look at the
20 bottom of Page 39, and she testified about that.

21 "You open up, it's an order screen just for
22 the day's work, whatever orders may have come in and you see
23 customer lists. Click on the customer lists and you see the
24 order.

25 "Question: You click on customer list and it

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1 tells you --

2 "Those are the orders that came in that day
3 and then you just process the orders from clicking on each
4 order as you go down through."

5 You see that?

6 A Right.

7 Q And then you package it and apply a UPS label.
8 Now is it your testimony you don't understand what Sharon was
9 talking about there?

10 A I don't understand it, but --

11 Q Did you ask her to look for that information?

12 A Yeah, we looked.

13 MR. LANDSMAN: I have no further questions,
14 your Honor.

15 MR. PURCELL: I have no questions of
16 Mr. Haritatos.

17 THE COURT: Thank you, sir, you're excused.
18 (Whereupon the witness was excused.)

19 MR. LANDSMAN: Could I confer with Ms. Kramer
20 for just a minute.

21 THE COURT: We're going to take a ten-minute
22 recess.

23 (Whereupon a recess was taken from 3:43 p.m.
24 to 3:55 p.m.)

25 THE COURT: Okay, let's try to move along,

Amanda Kramer - Direct by Mr. Landsman

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1 it's getting late in the day.

2 MR. LANDSMAN: Thank you, your Honor, last
3 witness is Amanda Kramer.

4 THE CLERK: Please raise your right hand.

5
6 A M A N D A K R A M E R , called as a
7 witness and being duly sworn, testifies as follows:

8 MR. LANDSMAN: I just want to emphasize at the
9 beginning, your Honor, that we're calling her for a very
10 limited purpose, we're not intending to waive any privilege
11 by doing that.

12 DIRECT EXAMINATION BY MR. LANDSMAN:

13 Q Ms. Kramer, by whom are you employed?

14 A Patterson, Belknap, Webb & Tyler.

15 Q When did you start your involvement in this
16 case?

17 A In approximately December 2006.

18 Q Okay. Were you involved in reviewing the
19 documents that we received from plaintiff in January 2007?

20 A Yes.

21 Q What were those documents?

22 A They were about 5500 pages of I believe UPS
23 and Fed Ex shipping labels.

24 Q Could you tell from them which products were
25 shipped?

Amanda Kramer - Direct by Mr. Landsman

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1 A No.

2 Q Did you try to correlate them with anything
3 else?

4 A Yes, I looked at all of the pages that were
5 produced and I went to the plaintiff's website to try to see
6 if the weight that was listed on the shipping labels
7 corresponded with the weight of any of plaintiff's products
8 which would allow us to figure out which products were
9 shipped to which state and there was no correlation at all.

10 Q Okay. And there's been some discussion about
11 why we asked for samples of Coco-Monds. Why did we need the
12 sample of Coco-Monds?

13 A When I went to the plaintiff's website to look
14 at the weight and compare it to the weight that was on the
15 shipping labels, I saw a product on there that had not
16 previously been on the website and it was called Coco-Monds
17 and there wasn't a picture and we didn't know if it bore the
18 Candyland trademark or not so in trying to figure out which
19 products were shipped to which states and which ones had the
20 Candyland mark on them and which ones didn't, we needed a
21 sample of Coco-Monds.

22 MR. LANDSMAN: Thank you, no further
23 questions.

24 THE COURT: Any cross?

25 MR. PURCELL: Briefly.

1 CROSS-EXAMINATION BY MR. PURCELL:

2 Q Ms. Kramer, were you able to decipher from any
3 of the 5,593 pages of UPS manifests the nature of any
4 products that were shipped in correspondence with the
5 particular UPS shipment?

6 A I couldn't tell what products were shipped by
7 reviewing the labels that were produced.

8 Q In any way, shape, or form?

9 A No. The labels contained the address of the
10 receiver and the shipping weight of the package. When I
11 looked at the Candyland website, the products on the website
12 have a weight and a shipping weight and no multiplier of any
13 of the products' shipping weight or actual weight on the
14 website seemed to correspond with the shipping weight on the
15 labels.

16 Q Okay. Were you aware at that time that the
17 testimony of the Haritatoses has been that about 90 percent
18 of their business or so is the Turkey Joints?

19 A I had read that, but we were not able to tell
20 where that 90 percent and where the other 10 percent fell in
21 the states that were reflected in the shipping labels.

22 Q So by going to the website and trying to find
23 out weights and so forth and you discover this Coco-Monds
24 trademark, you for some reason thought that if you learned
25 about this one product, you would be able to decipher the

1 whole spectrum of what was submitted to the UPS manifest?

2 A No, that's why we served the interrogatories
3 that asked for the identification of the products by year for
4 each of the years that were reflected in the shipping labels,
5 because we needed to know what percentage of the products had
6 the Candyland mark, what percentage didn't, for each year so
7 that we could try to make some sense of the shipping labels.

8 Q But the answer to my question is that by --
9 rephrase my question. So by trying to find out more
10 information in discovering this Coco-Monds thing, you weren't
11 able to find out really any more information about the UPS
12 manifests and to what products they related, correct?

13 A Well, we didn't get any more information
14 because the plaintiff didn't respond to the discovery
15 requests.

16 Q There was really no hope of getting realistic
17 information about the manifests and what products were
18 shipped with those UPS shipments by asking questions about
19 the Coco-Monds in interrogatories, was there?

20 MR. LANDSMAN: Your Honor, we didn't ask
21 questions about Coco-Monds in the interrogatories, she was
22 referring and my question referred to a document request for
23 a sample of Coco-Monds, very simple.

24 Q Let's go to -- do you have, Ms. Kramer,
25 plaintiff's --

Amanda Kramer - Cross by Mr. Purcell

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1 THE COURT: What's the real relevance of all
2 of this? Is there any? Seems to be no dispute whatsoever
3 that no one knows what was shipped by looking at the UPS or
4 the Fed Ex labels, what's the relevance of all this?

5 MR. PURCELL: That the discovery they sought
6 on January 28th, Judge, which they now say was triggered by
7 this inspection of the documents is simply incorrect
8 testimony, it simply is incredible. Their third set of
9 interrogatories to plaintiff says, "State whether the product
10 Coco-Monds sold on the website www.turkeyjoints.com has the
11 word Candyland as part of its name or on the packaging and,
12 if so, state where it appears." Does that help them get the
13 weight information for the UPS manifests and so forth? No.

14 MR. LANDSMAN: Your Honor, the testimony
15 wasn't that this went to the weight, it was in looking at all
16 sorts of other things we found a new product that we hadn't
17 seen before.

18 THE COURT: I heard that and obviously they
19 found a new product and wanted to find out what it was all
20 about. So let's --

21 MR. PURCELL: But that was not because of the
22 delay in any production of those documents is I guess my
23 point.

24 MR. LANDSMAN: No, in fact it should have been
25 produced a long time before we ever asked for it, we just

Amanda Kramer - Cross by Mr. Purcell

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1 made a very specific request.

2 THE COURT: Anything further?

3 MR. PURCELL: Yes.

4 Q Ms. Kramer, on the UPS manifests, were there
5 any customer names and addresses?

6 A Yes.

7 MR. PURCELL: No further questions.

8 THE COURT: All right.

9 MR. LANDSMAN: None, your Honor.

10 THE COURT: Thank you, you're excused.

11 (Whereupon the witness was excused.)

12 THE COURT: Any other additional --

13 MR. LANDSMAN: That's our case, your Honor.

14 THE COURT: Okay.

15 MR. HUGHES: Your Honor, I've had marked
16 during the recess Plaintiff's Exhibit 36 for identification.
17 I spoke with opposing counsel, he has I understand no
18 objection to its admissibility. May I approach, your Honor.

19 MR. LANDSMAN: That's correct, your Honor.

20 MR. HUGHES: It is in fact the infamous
21 June 26th letter that the court had already gotten out of the
22 docket.

23 THE COURT: Right, okay. Proceed.

24 MR. PURCELL: Your Honor, briefly, with regard
25 to Exhibit 35 which is the Trademark Office protective order,

1 I believe it's been stipulated this is the protective order
2 and Mr. Landsman talked about during his oral argument that
3 some provision of this agreement restricted the parties from
4 using documents other than in connection with the Trademark
5 Office proceeding and I was hoping that he might tell me
6 where that's found.

7 MR. LANDSMAN: I thought I had, it's on
8 Page 23, Item 11, says, "Disclosure of information protected
9 under the terms of this order is intended only to facilitate
10 the prosecution or defense of this case," TTAB proceeding.
11 And as Mr. Purcell knows, he suggested that he simply agreed
12 that what had been produced in the TTAB proceeding could be
13 used here and we accepted that.

14 THE COURT: You know, it's commonplace in
15 federal litigation to have other proceedings, administrative
16 or proceedings in other courts and that doesn't absolve a
17 party from producing the stuff twice if that's the case.
18 This whole issue of whether the material was available in
19 some other forum doesn't sound right to me. Whether it was
20 or it wasn't, there's no problem usually with producing it
21 again so that the record before this court is complete.

22 This court doesn't want to get involved in
23 reviewing pieces of information from other courts and pieces
24 of discovery from other proceedings and administrative
25 tribunals and this and that. That's just the way things

1 usually proceed in this court and I assume in most federal
2 courts. That's just an observation, go ahead.

3 MR. PURCELL: I call Mr. Landsman to the
4 stand.

5 MR. LANDSMAN: Your Honor, I was not listed as
6 a witness.

7 MR. PURCELL: I listed rebuttal, any witness
8 needed for rebuttal or impeachment. The first time I've
9 heard about any argument regarding this TTAB protective order
10 is today, your Honor, and I want to have Mr. Landsman rebut,
11 you know, other testimony including his own about the impact
12 of this TTAB order. He tells the court that he thought it
13 prohibited him and his client from using any documents or
14 information we provided in the Trademark Office proceeding in
15 this proceeding.

16 THE COURT: I'm not going to let you get into
17 a lot of details about this, putting aside this issue of
18 whether you're allowed to testify, because I think it's being
19 argued to death. This case in the Northern District had
20 discovery and there was, there were requests for production
21 of documents, responses. You can't simply say, go to your
22 other files or go to some other proceeding and dig it out,
23 that's not a proper response. It's not even clear from the
24 record before me that the same law firm that's representing
25 Hasbro in this case was representing Hasbro in the TTAB, I

1 assume that's the case.

2 MR. LANDSMAN: It is, your Honor.

3 THE COURT: What's -- give me an offer of
4 proof, what do you expect to establish here?

5 MR. PURCELL: The offer of proof is that in
6 fact contrary to Mr. Landsman's portrayal to this court,
7 Hasbro and the law firm of Patterson, Belknap has used the
8 documents and information produced in the TTAB proceeding in
9 this lawsuit. He wants to say, oh, we couldn't use those at
10 all, despite my statement, we've already produced them to
11 you, use them again and I think, your Honor, if we dig into
12 the deposition transcripts and exhibits we will see that
13 Hasbro used in depositions in this lawsuit exhibits of
14 documents that were produced in the TTAB proceeding so in
15 fact they did use them, it's my recollection anyway in this
16 lawsuit, and yet Mr. Landsman's saying, ooh, ooh, we couldn't
17 cross the border here between the two, the TTAB proceeding
18 and this proceeding. Oh, those documents we couldn't touch,
19 we couldn't use in any way, shape, or form and yet in fact
20 it's my recollection, Judge, that they were used in this
21 lawsuit.

22 THE COURT: How does that defend this motion
23 for sanctions under the Rule 37?

24 MR. PURCELL: Well, to the extent Mr. Landsman
25 is saying that we didn't produce the documents because we

1 can't rely upon our prior production in connection with the
2 TTAB proceeding, among other arguments we would make is that
3 his statement that if they were produced in the TTAB
4 proceeding the parties were prohibited from using them in
5 this proceeding is false, that in fact Hasbro itself and the
6 Patterson, Belknap firm did use that information, did use
7 those documents in this proceeding. So --

8 THE COURT: Assuming that you're correct for
9 the sake of argument, how does that defend against their
10 motion for discovery sanctions for your alleged failures to
11 follow court orders and supply discovery?

12 MR. PURCELL: I don't think so because the
13 court orders don't address those documents from the other
14 case, I don't think, Judge.

15 THE COURT: I mean if it's just, you know, a
16 mud-slinging contest, that's -- that makes no sense to me.
17 They've produced tons of exhibits, you've produced tons of
18 exhibits but the issues here are very clear, the issues are
19 whether there was a failure to produce discovery after two
20 court orders, my court order and Judge Hurd's court order,
21 and whether there were other discovery abuses in terms of the
22 way material was objected to and other issues in the
23 discovery.

24 This discovery, this case has been a nightmare
25 almost from the very beginning. There's more work in this

1 case than in any other 10 cases I've ever handled, I've been
2 on the bench for 20 years. This case is unbelievably complex
3 because of minutia, tons and tons of minutia and
4 distractions. But if you want, I'm going to allow you to
5 call Mr. Landsman --

6 MR. PURCELL: No.

7 THE COURT: -- despite the fact that he is not
8 on the witness list, because this is the only hearing we're
9 going to have. After this, it's decision time.

10 MR. PURCELL: I think I've made my point, your
11 Honor, and you understand it and that's sufficient.

12 THE COURT: Mr. Landsman, would you step
13 forward, please. I'm going to allow him to take your
14 testimony.

15 MR. LANDSMAN: I thought he was saying he
16 doesn't --

17 THE COURT: You withdraw it?

18 MR. PURCELL: I withdraw it, Judge, I mean I
19 made my point with you and I think you understand it and you
20 know --

21 THE COURT: But don't be dissuaded by my view.
22 I am going to look through all of the exhibits, if you want
23 to have Mr. Landsman testify, I'm giving you that
24 opportunity. Don't come back in and say, well, you know, you
25 didn't want to hear his testimony. I'll hear whatever proof

Kim Landsman - Direct by Mr. Purcell

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1 you want to present.

2 MR. PURCELL: We'll put him on then.

3 THE COURT: All right. Looks like I persuaded
4 him to have you testify.

5 THE CLERK: Please raise your right hand.

6 MR. LANDSMAN: Thank you, your Honor.

7

8 K I M J . L A N D S M A N , called as a
9 witness and being duly sworn, testifies as follows:

10 DIRECT EXAMINATION BY MR. PURCELL:

11 Q Mr. Landsman, do you have a copy of the
12 protective order in the TTAB proceeding there, Exhibit 35?

13 A It's not marked but this is what it is, yes.

14 Q And referring to the bottom of Page 23.

15 A Yes.

16 Q Is it your position that this paragraph 11
17 prohibited the parties from using documents produced in the
18 TTAB proceeding in the instant lawsuit?

19 MR. LANDSMAN: Your Honor, he's asking for my
20 legal opinion on that. I think he can ask questions about
21 facts but not about my legal position in light of what the
22 court order says.

23 THE COURT: Well, obviously I'll have to look
24 at this and interpret it, but let me hear your view about
25 that.

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1 A This protective order said that disclosure of
2 information would be only in the prosecution of the offense
3 in the TTAB case. Therefore my position was that your
4 objection that it had been produced before was ill-founded,
5 it was then a series of correspondence going back and forth
6 in which you offered finally to let us use the information
7 that had been produced in the TTAB proceeding and we accepted
8 that finally as a way of essentially deeming the documents
9 reproduced in this case so that they could be used.

10 Q All right. Mr. Landsman, you said it's
11 intended to be used only in the prosecution, that's not what
12 this order says, is it? It says disclosure of information
13 protected under the terms of this order is intended only to
14 facilitate the prosecution or defense of this case. There's
15 nothing which says, and it shall not be used for any other
16 purpose; doesn't say that, does it?

17 A First of all, Mr. Purcell, I'm not sure that
18 this is the only document, I would have to go back to my
19 files to see what else was happening. I know that there was
20 some extensive -- I recall there being some extensive back
21 and forth about the terms of this, and I would have to look
22 to that to interpret this, but in an -- more direct answer to
23 your question, I did not believe that I was entitled to use
24 discovery that was produced in the TTAB under the terms of
25 this order directly in this case, at least not without the

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1 explicit stipulation of the plaintiff to do that.

2 Q The plaintiff meaning Mr. Haritatos?

3 A Yes.

4 Q Meaning me as his representative?

5 A The plaintiff, yes.

6 Q Do you recall ever specifically asking for
7 that type of permission?

8 A Excuse me?

9 Q Do you ever recall specifically asking for
10 that type of permission from the plaintiff in this lawsuit,
11 can we use the information, documents from the TTAB
12 proceeding in this lawsuit, do you have any objection to
13 that?

14 A If you'll let me look at the exhibits,
15 Mr. Purcell, I could give you an answer to that question much
16 more specifically because --

17 Q Do you have any recollection --

18 A -- because --

19 THE COURT: Hey, hold it, hold it, hold it,
20 stop. When he's answering a question, let him finish; when
21 you're asking a question, he'll let you finish.

22 THE WITNESS: I would like to be able to look
23 at the correspondence in order to give my best answer to that
24 question.

25 THE COURT: All right, that's sufficient.

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1 Q What is your best answer without looking at
2 the document?

3 MR. LANDSMAN: Your Honor, I would not like to
4 speculate. I know that there was correspondence in which
5 Mr. Purcell made that offer, I do not recall whether we had
6 asked for it beforehand or not.

7 Q Do you recall there was an informal agreement
8 that we could use that or that Hasbro could use that
9 information in this lawsuit?

10 A I recall your making that offer in a letter,
11 Mr. Purcell, and I recall our accepting it because we really
12 didn't have really much of any alternative other than to go
13 to the court and it seemed the best thing to do to accept
14 that.

15 Q Do you recall instructing any associates in
16 your firm such as Michael Sant'Ambrogio that he could not use
17 the information or the documents from the Trademark Office
18 proceeding in this lawsuit?

19 A I'm going to refuse to answer that on the
20 grounds of work product privilege.

21 Q If Mr. Sant'Ambrogio had used --

22 MR. HUGHES: Your Honor, you've already
23 overruled the work product objection.

24 THE COURT: I'll allow that. This is -- this
25 whole line of questioning is tangential, I'm doing it only as

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1 a courtesy to Mr. Purcell, so I'm not going to allow it to
2 get out of hand. Sorry.

3 (Whereupon the question was read.)

4 A If the judge orders me to answer, I will
5 answer.

6 THE COURT: I'm not going to do that.

7 Q Oh, I thought you -- okay. All right. If
8 Mr. Sant'Ambrogio had used information or documents from the
9 TTAB proceeding in this lawsuit, would that in your opinion
10 be a violation of the TTAB order?

11 MR. LANDSMAN: Your Honor, I'm not here as a
12 legal expert.

13 THE COURT: Sustained, I'm not going to allow
14 that. If you have any fact questions, ask them but I'm not
15 going to allow him to give legal opinions about other
16 documents and things like that, that's not the purpose of
17 this hearing.

18 MR. PURCELL: Should I try to say what was his
19 state of mind, Judge, if that would help out?

20 THE COURT: No, I don't think so.

21 Q All right. Mr. Landsman, you realize that the
22 protective order with TTAB relates at most to information and
23 documents that's been designated confidential, correct?

24 A My recollection, Mr. Purcell, is that you
25 blanketly labeled everything confidential that you produced.

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1 I may be wrong about some particulars but that was my
2 recollection.

3 Q You may be very wrong about that, correct?

4 A I may be very wrong? The documents are here,
5 I haven't looked at them recently but that was my
6 recollection.

7 Q So, contrary to what you told this court that
8 the TTAB protective order had a blanket prohibition of using
9 any information, documents in that lawsuit in this lawsuit,
10 you now are saying that at most the protective order of the
11 Trademark Office only pertained to information, documents
12 that a party had stamped as confidential, is that correct?

13 A Mr. Purcell, I don't recall making that
14 statement to the court. What I did state is that this says
15 that disclosure of information protected under the terms of
16 this order is intended to facilitate the prosecution or
17 defense of this action, and I interpreted that as I
18 previously told you.

19 Q Did you --

20 A This is all moot because, as you know, we did
21 eventually reach an agreement that we would use those
22 documents and those depositions in this case.

23 Q Did you ever inform me as the plaintiff's
24 attorney words to the effect, don't use the information,
25 documents that Hasbro's already produced in the Trademark

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1 Office proceeding in this instant litigation; did you ever
2 admonish me that?

3 A I don't recall the subject ever coming up,
4 Mr. Purcell.

5 MR. PURCELL: All right. No further
6 questions.

7 MR. LANDSMAN: I don't have any.

8 THE COURT: All right. You're excused.

9 (Whereupon the witness was excused.)

10 THE COURT: Okay. Anything further from
11 plaintiff?

12 MR. PURCELL: Nothing further, your Honor.

13 THE COURT: Proof is closed on both sides.
14 Any rebuttal?

15 MR. LANDSMAN: Excuse me?

16 THE COURT: Anything further from the moving
17 party?

18 MR. LANDSMAN: No, but we could hand up the
19 demonstratives if that would be helpful. I've given a copy
20 to counsel for plaintiff already.

21 THE COURT: What I tentatively intend to do is
22 review all these documents and portions of the testimony and
23 render an oral decision within two or three weeks. I'll
24 issue it from the bench and you're invited to attend and
25 listen to it. I would think that about three weeks, maybe

1 three weeks from today which would be Tuesday, the 25th. Any
2 conflicts in your schedule that you know of?

3 MR. LANDSMAN: I don't have any conflicts,
4 your Honor.

5 THE COURT: Mr. Purcell?

6 MR. PURCELL: What date is that again, your
7 Honor?

8 THE COURT: Tuesday, the 25th, three weeks
9 from today.

10 MR. PURCELL: I think that's okay, Judge.

11 THE COURT: All right. I'm not sure whether
12 it will be the morning or the afternoon, I would think the
13 afternoon, but that's when I'm going to issue the decision.
14 Anything further that either side needs to submit?

15 MR. LANDSMAN: I will need to go back and
16 check my file to see if the document about the protective
17 order TTAB is the whole thing or not and that would be the
18 only thing I would.

19 THE COURT: All right. I'll allow a further
20 submission on that.

21 MR. LANDSMAN: And then --

22 THE COURT: You say there was some agreement
23 to use the documents?

24 MR. LANDSMAN: It's in the correspondence,
25 there's just some back and forth about it, and your Honor, if

1 the motion is granted, we would ask for leave to then submit
2 our attorney fee application.

3 THE COURT: I was wondering if we can shorten
4 that up.

5 MR. LANDSMAN: Do you want us to do it
6 beforehand?

7 THE COURT: I guess, let's just wait until the
8 25th, that would be --

9 MR. LANDSMAN: If it suits the court's
10 convenience, we could certainly do it well before then.

11 THE COURT: You have the material almost
12 assembled?

13 MR. LANDSMAN: I was starting to go through it
14 and try to filter it out and redact it. It would take
15 another few days and I'm going to be out most of this week
16 but I could do it next week.

17 THE COURT: All right. Let's just hold off on
18 that. Anything further?

19 MR. PURCELL: Yes, your Honor. Some attempt
20 to try to move things along, we're still willing to get the
21 invoices for the billings for the Trademark Office
22 proceeding, we can either do our best to redact what we
23 believe is attorney-client privileged information, give it to
24 the other side, if they have any problems with it, send the
25 originals in to your Honor for an in-camera inspection and

1 order.

2 THE COURT: I don't want any in-camera
3 inspection at this point. As I said before, the discovery in
4 this case has been astronomically voluminous, and part of
5 the -- part of what I tried to do is keep the discovery
6 moving without getting into the nitty-gritty of the massive
7 amount of applications that had been made which is overly
8 contentious litigation, something we're not used to in the
9 Northern District. But I'll deal with the motion in front of
10 me on the 25th. Okay. If there's nothing further, court's
11 adjourned. The clerk -- my best estimate is that it will be
12 at 2:00 on the 25th, I'll render the decision on the
13 plaintiff's -- on Hasbro's motion for sanctions. All right.

14 MR. LANDSMAN: Thank you.

15 THE COURT: All right. Thank you.

16 THE CLERK: Court is adjourned.

17 (Court Adjourned, 4:23 p.m.)

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C E R T I F I C A T I O N

I, JODI L. HIBBARD, RPR, CRR, CSR, Official
Court Reporter in and for the United States District Court,
Northern District of New York, DO HEREBY CERTIFY that I
attended the foregoing proceedings, took stenographic notes
of the same, and that the foregoing is a true and correct
transcript thereof.

JODI L. HIBBARD, RPR, CRR, CSR
Official U.S. Court Reporter